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No. (1)

Supreme Court, U.S.
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In The

Supreme Court of the United States

DEBORAH R. COEN,

Petitioner,

v.

LOUIS COEN AND
COMPAYNE (HAMPSTEAD) LIMITED,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Edward Coen assigned this case to Petitioner Dr. Deborah R. Coen. Petitioner Dr. Deborah R. Coen filed a civil action against Louis Coen, Compayne (Hampstead) Limited, and other defendants, alleging that Respondents made material misrepresentations to Edward Coen about the value of his shares in the company, Compayne (Hampstead) Limited. The district court denied personal jurisdiction on the basis that: Edward had asked to sell his shares in the company; certain of the misrepresentations pertained to "moral obligations" as opposed to "legal obligations"; and, that Edward had failed to obtain his own valuation of the company which is located in London. After the district court had made its ruling, Respondents attempted to manipulate the record of the district court and to use the district court to perpetrate another fraudulent scheme against Petitioner in the United Kingdom. In response, Petitioner filed a Rule 60(b) Motion. The district court denied the motion stating that if Petitioner did not like the manipulation of the court by the Respondents then she should take her paperwork to a court in London. The Eighth Circuit upheld the dismissal of this case for want of personal jurisdiction. The Eighth Circuit also sustained the dismissal of the Rule 60(b) Motion.

The questions presented are:

Whether a foreign national may defraud a resident of Minnesota with impunity, in a share transaction, simply because that resident either initiates or

QUESTIONS PRESENTED – Continued

participates in the discussions leading to the sale of his shares.

Whether the Eighth Circuit decision in *Coen v. Coen*, 509 F.3d 900 (8th Cir. 2007) (App. 1) was incorrect when it made the mere fact that a defendant is a foreign national an insuperable bar to personal jurisdiction.

Whether the Eighth Circuit decision in *Coen v. Coen*, 509 F.3d 900 (8th Cir. 2007) (App. 1) was incorrect when it created a new, federal, common-law tort of fraud.

Whether the Eighth Circuit decision in *Coen v. Coen*, 509 F.3d 900 (8th Cir. 2007) (App. 1) was incorrect when it decided the issue of personal jurisdiction based only upon the actions, omissions, and attributed beliefs and thoughts of Edward, the victim, and not upon the actions of the defendants.

Whether the Eighth Circuit decision in *Coen v. Coen*, 509 F.3d 900 (8th Cir. 2007) (App. 1) was incorrect when it failed to consider any of the facts and evidence in support of Petitioner's case.

LIST OF PARTIES

The parties below were Louis Coen, Daniel Coen, Anita Ariella Coen, Carole M. Coen, Nicholas Jackson Clark, Peter John Bunker, Compayne (Hampstead) Limited, Trustees of the Victor Coen Will Trust, Trustees of the Miriam Coen Will Trust, Trustees of the Estate of Ms. Lily Coen, John Doe One, and John Doe Two. The respondents to this Petition for Writ of Certiorari are only Louis Coen and Compayne (Hampstead) Limited.

CORPORATE DISCLOSURE STATEMENT

Compayne (Hampstead) Limited is a corporation organized under the laws of the United Kingdom of Great Britain and Northern Ireland.

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PETITION FOR WRIT OF CERTIORARI

Petitioner Dr. Deborah R. Coen respectfully petitions that a Writ of Certiorari be issued to review the judgment of the United States Court of Appeals for the Eighth Circuit entered on December 10, 2007, in order to correct a violation of the Tenth Amendment, to resolve a conflict between the Eighth Circuit and the United States Supreme Court, to resolve a conflict between the Eighth Circuit and the other Circuits, and for this Court to exercise its supervisory powers over the Eighth Circuit. The Court is squarely presented with a holding that a foreign national may defraud with impunity a resident of Minnesota, in a share transaction, if that resident initiates or participates in discussions leading to the sale of his shares. Petitioner requests that this Court extend its holding in *Calder* to the situation where the defendant is a foreign national and the "intentional, and allegedly tortious, actions" of the defendant were committed on foreign soil, the effects of which were felt in the forum state. *Calder v. Jones*, 465 U.S. 783 (1984).

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Eighth Circuit is dated December 10, 2007 and was published in the Federal Reporter as *Coen v. Coen*, 509 F.3d 900 (8th Cir. 2007). (App. 1). The Order of District Judge Patrick Schiltz, United States district court for Minnesota, denying the Rule

60(b) Motion is dated December 21, 2006 and was not published in the Federal Supplement. (App. 17-21). The Order of District Judge Patrick Schiltz dismissing this case for want of personal jurisdiction is dated September 22, 2006 and was not published in the Federal Supplement, but is published at *Coen v. Coen* 2006 WL 2727219 (D. Minn. 2006). (App. 14-16).

JURISDICTION

The judgment of the United States Court of Appeals for the Eighth Circuit was entered on December 10, 2007. A Petition for Rehearing and Petition for Rehearing En Banc was timely filed, and was denied on January 22, 2008. (App. 84). That denial was vacated on January 25, 2008. (App. 86). The Eighth Circuit again denied the Petition for Rehearing and Petition for Rehearing En Banc on February 20, 2008. (App. 88). Pursuant to Supreme Court Rule 13.1, this petition has been timely filed within 90 days of the final denial of rehearing. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

RELEVANT PROVISIONS INVOLVED

A central issue in this case is whether the Eighth Circuit, and the district court, were correct in creating a new, federal, common-law tort of fraud by intentional misrepresentation in violation of the

Tenth Amendment. The Tenth Amendment provides that: "[t]he powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." Tenth Amendment, U.S. Constitution.

STATEMENT

This case has a long history arising out of the sale in 1999 of a 42% shareholding owned by Edward Coen in Compayne (Hampstead) Limited ("Compayne"), a company organized under the laws of the United Kingdom ("the 1999 Transaction").

Edward and Louis Coen are brothers; their sister Lily Coen died in March 2002 at age 74 after having been institutionalized since the age of 19 with schizophrenia. Since before 1990, Louis had been the Trustee of Lily Coen, which in Minnesota amounts to being a conservator of the estate and guardian of the person. Edward is a resident of the State of Minnesota and Louis is a resident of Paris, France. Victor and Miriam Coen were the parents of Edward, Louis, and Lily: both Victor and Miriam were residents of the United Kingdom at all times relevant to this case.

I. Statement of the Facts In Support of Petitioner's Case

Victor and Miriam organized Compayne in 1955 for the purposes of owning and managing real estate

in London. The company had 10,000 authorized shares of which 9,909 were issued and outstanding when Victor died in 1966. In 1966, the shares were owned by members of the Coen family as follows: Victor and Miriam each held 4,950 shares, Edward held 3 shares, and Louis held 4 shares. Victor's Will created the Victor Coen Will Trust ("VCWT") that was comprised of Victor's estate, including his 4,950 shares, that was to be "held UPON TRUST" after 1966 and until Lily died. Joint Appendix ("JA")[1] 786-787, 796-797. Victor's Will specifically provided that the VCWT should devise as follows: a beneficial interest to Miriam for life; then the residuary was to be held upon trust, one-sixth to Edward absolutely, one-sixth to Louis absolutely, and a one-third beneficial interest to Lily for life. *Id.* Miriam died in October 1989. After September 1992, Louis was one of the Trustees of the VCWT along with Peter John Bunker and Nicholas Jackson Clark.

Between about 1980 and 1984, Louis made an arrangement with Miriam such that her 4,950 shares would be divided between Edward and Louis; ostensibly for the purpose of avoiding inheritance tax upon Miriam's death. At the time of her death, Miriam

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[1] The Joint Appendix was submitted to the Circuit Court of Appeals for the Eighth Circuit with Petitioner's Opening Brief. Reference to an "Exhibit" pertains to those exhibits submitted to the district court for the District of Minnesota. Reference to a "Document" pertains to those documents docketed with the district court for the District of Minnesota.

apparently held 10 shares in Compayne along with other assets. Miriam's Will provided that her estate was to devise as follows: one-fourth to Edward; one-fourth to Louis; and one-half to be held on trust for Lily. At Lily's death, the remainder was to devise as to one-half to Edward and as to one-half to Louis.

A. The scheme to defraud Edward

Louis' scheme to defraud Edward contained two primary axes: first, he convinced Edward that Lily was entitled to 50% of the asset value of Compayne and that Edward had a duty to ensure that that amount was preserved for her; and second, he convinced Edward that the value of Compayne was only about £1,200,000 in 1996 when the vacant-possession value was about £2,575,000. By the time that the 1999 Transaction occurred, the value of Compayne exceeded £4,000,000. In reliance upon Louis' misrepresentations, and omissions of fact in face of a duty to disclose, Edward conveyed his 42% shareholding in the company for £284,831.61, which was less than about 7.1% of the asset value of Compayne.

Louis implemented his scheme in August 1989, some three months before Miriam died, when he told Edward that Victor imposed an "obligation" upon both of them by asking Edward and Louis "to put aside two-thirds of the capital and income for her [Lily]" and to keep the principle intact while Lily was alive. JA at 162. Both of these representations were false because Victor never imposed any such obligation

upon either Edward or Louis. Exhibit I.B, Tab 1; JA at 786, 796-797.

The plain language of Victor's Will provides that all of Victor's 4,950 shares were to be "held UPON TRUST" until Lily died. *Id.* However, a mere two months after Miriam died, Louis and the other Trustees of the VCWT ("Trustees") convinced Edward that the VCWT should be divided equally between Louis, Edward, and the Trustee of Lily Coen, with each receiving 1,650 shares ("the 1992 Transaction"). Exhibit VII.K at 1-9. This action alone is sufficient evidence to demonstrate that Louis and the other Trustees knew that Victor never imposed any obligation upon Edward to reserve any of Compayne for Lily.

In May 1991, Edward considered the possibility of transferring his 1,650 shares directly from the Trust to his children, Deborah, Joel, and Ethan. Recognizing that Deborah, Joel, and Ethan would present a much more difficult set of individuals to manipulate than Edward, Bunker, as a Trustee, represented to Edward that "there would still be a moral obligation on them [Edward and his wife Rena] to look after Lily" even if Edward conveyed the shares to his children. Exhibit VII.K at 14. Subsequently, to force Edward into retaining the 1,650 shares that were to be distributed to him from the VCWT, Bunker told Edward that Victor's Will could not be altered to make the 1,650 shares go directly to Deborah, Joel, and Ethan. Exhibit VII.K at 15. Even though Bunker told Edward in 1991 that the Will could not be altered, the

Trustees distributed Louis' 1,650 shares from the VCWT directly to Louis' wife Ginette, and their three children in January 1992. None of the shares went to Louis; therefore, Louis knew that he had no obligation to care for Lily. Exhibit VII.K at 17; Exhibit I.O. On June 1, 1992, Edward and the Trustee of Lily Coen each received 1,650 shares from the VCWT ("Edward's 1,650 shares" and "Lily's 1,650 shares"). Exhibit I.O; JA at 861-870.

By the middle of 1993, Edward became concerned about the amount of money that he would need to care for his wife Rena, who, by that time, was a brittle diabetic and was seriously ill with heart problems, which required open-heart surgery. Louis was fully aware of Rena's condition. By December of 1993, Edward approached Louis to obtain an agreement that Edward could count on having a certain amount of money by a certain time in the form of a distribution from Compayne based upon his 42% shareholding in the company. JA at 194. Over the course of the next two and one-half years, Edward and Louis discussed Edward's goal of obtaining financial security for the care of his wife. At some time in the first half of 1994, Louis and Edward came to the understanding that Edward could obtain his required liquidity by selling some, or all, of his shares to Louis. JA at 197. All that was left was for Louis to misrepresent Lily's interest in Compayne and the "asset value" of Compayne in order to convince Edward to sell his shares at the lowest possible price.

B. Louis established the price and date for selling Edward's 4,126 shares

In December 1995, Louis, his son Daniel, Edward, Rena, Joel and Ethan met in New York to discuss the sale of Edward's shares. Exhibit VII.R, § 1.8.3, page 76. During this meeting, Louis and Daniel evidently convinced Edward to delay the sale of his shares because: (1) the sale of 65 Compayne Gardens was not in the best financial interest of Compayne, JA at 243; (2) a delay of about three years was required to give the company time to raise the funds necessary for the buy-out of Edward's shares, *id.*; and (3) "complications with the IRS would make it impossible to sell either builing [sic] prior to 1999 or 2000," JA at 258. Because Louis had already established the price for Edward's 4,126 shares by October 30, 1995, the requested delay had nothing to do with obtaining a better price for Edward. Having forgotten the terms discussed during the meeting in New York, Edward decided in late December 1995 that he would prefer to complete the buy-back of his shares as soon as possible. JA at 258. The evidence shows that Edward wanted to complete the sale of his shares in a short time to preserve his relationship with Louis; the evidence does not indicate that Edward was willing to reduce his claim on the asset value of Compayne to preserve his relationship with his brother. JA at 242, 246.

C. Louis misrepresented Lily's entitlement

On December 21, 1995, Edward wrote to Louis that he wanted to obtain an agreement on the sale of his shares so that he could have some certainty regarding liquidity. In response, Louis expressed outrage, on January 18, 1996, that Edward wanted to complete an agreement in short course rather than waiting as discussed during the December 1995 meeting in New York. JA at 243-245. Further, Louis represented to Edward that: (1) Victor had requested that 50% of the company was to be held for Lily; and, (2) that precluded Edward from accessing any more than 21% of the asset value of Compayne. JA at 246-247. The first representation was both false and impossible. JA at 591-645. During the 1992 Transaction, Louis and the other Trustees distributed the 4,950 shares out of the VCWT to Edward, Louis, and the Trustee of Lily Coen. Had Louis actually believed that Lily was entitled to 50% of the company then he would not have distributed the shares out of the VCWT during the 1992 Transaction. The second representation is equally false. Even if Victor's Will was operative as to any shares after the 1992 Transaction, which Petitioner argues it was not, the "obligation" would have extended only to one-twelfth of the shares of Compayne (or 825 shares), not to Edward's 4,126 shares. However, after the 1992 Transaction, Victor's Will was not operative as to any shares; therefore, Edward owed no "obligation" to Lily. After the 1992 Transaction, the obligation to Lily

rested only with Louis as the Trustee of Lily Coen because he was holding her shares.

On January 25, 1996, Edward directly and specifically asked Louis about "Victor's intent that she [Lily] should have a one third share in the Company." JA at 248. In response, on February 7, 1996, Louis told Edward that Victor requested that one-half of Compayne be reserved for Lily. JA at 279. Edward clearly accepted Louis' representation that Lily was entitled to one-half of Compayne. JA at 248. This representation was false and mislead Edward into reducing his call on the company to 25% of what he believed to be the asset value of Compayne, for his 42% shareholding.

D. Louis misrepresented the asset value of Compayne

On December 27, 1994, Louis affirmatively represented to Edward that "approximately 35% of the total value" of Compayne was £353,000, which corresponds to a total asset value of £1,008,571. JA at 469. To support this representation, Louis purportedly provided to Edward what Louis represented to be a valuation performed by Mr. Martin Arnold ("Arnold '1994 Estimate'"). JA at 471-473. However, Respondents have since admitted that: no evidence existed to show that the Arnold "1994 estimate" "was even prepared for any reason having to do with Edward's desire to sell his shares." Document 140 at 6. Also, from October 30, 1995, through May 9, 1996,

Louis represented to Edward that the asset value of Compayne was about £1,200,000. JA at 490-492, 323-325. This supports the claim for fraud by intentional misrepresentation. Further, Louis committed fraud by omission because he knew that Edward believed that that was the asset value, and Louis never corrected this understanding. JA at 323.

During the discussions regarding Edward's 4,126 shares, Edward asked Louis about the value of 25% of Compayne. JA at 305. Louis clearly represented that it was £300,000. JA at 307. Indeed, Louis stated to Edward that: (1) a "professional" valuation had been performed on the company; (2) that other valuations could be done but would result in about the same number; (3) that a sham offering of the properties for sale could be done to determine the market value. *Id.* That is, not only did Louis represent the value of Compayne as being £1,200,000, but he also represented that a professional valuer had provided that number and that the number was within the range that other valuers would provide. *Id.*

It is undisputed that, as at March 1996, the vacant-possession value of Compayne was about £2,575,000. Exhibit I.M at 10-12. Louis also never told Edward that the value of Compayne was increasing rapidly between March 1996 and March 1999. By March 1999, the value of Compayne was approximately £4,000,000. *Id.*; Exhibit I.P. In March 1999, Edward received £284,831.61 for his 42% shareholding in the company, which was less than about 7.1% of the asset value of Compayne.

II. The Law of Fraud and Fraud by Omission in Minnesota

The claims of fraud and fraud by omission are governed by Minnesota law. *Klaxon v. Stentor Manufacturing Co.*, 313 U.S. 487, 496-497 (1941). To establish that Respondents committed the tort of fraud or fraud by omission in Minnesota, Petitioner must show: (1) a false representation, or omission, of material fact, (2) made with proper scienter, and (3) that the Respondents intended for Edward to act on the representation or omission. *Florenzano v. Olson*, 387 N.W.2d 168, 174 (Minn. 1986); *Specialied Tours, Inc. v. Hagen*, 392 N.W.2d 520, 532 (Minn. 1986); *Davis v. Re-Trac Manufacturing Corp.*, 149 N.W.2d 37, 38-39 (Minn. 1967). To recover in a cause of action for fraud, Petitioner must also show that: (1) Edward was justified in relying on the representation or omission; and (2) Edward suffered damages. *Vikse v. Flaby*, 316 N.W.2d 276 (Minn. 1982); *Davis*, 149 N.W.2d at 39.

Under Minnesota law, the concealment of a material fact constitutes fraud upon the plaintiff. *Richfield Bank and Trust Co. v. Sjogren*, 224 N.W.2d 648, 650 (Minn. 1976) (quoting *Thomas v. Murphy*, 91 N.W. 1097, 1098 (Minn. 1902)). Silence may constitute a misrepresentation if such silence constitutes an affirmation or acquiescence in another statement. *Watkins v. Lorenz*, 119 N.W.2d 482, 486 (Minn. 1963). Also, the failure to disclose a material fact in the face of a duty to do so constitutes fraud by omission. *Marsh v. Webber*, 13 Minn. 109 (Minn. 1868). The possession of "special knowledge of material facts to

which the other party does not have access" is, by itself, sufficient to generate a duty to disclose. *Klein v. First Edina National Bank*, 196 N.W.2d 619, 622 (Minn. 1972).

In Minnesota, that defendant had the proper scienter "may be proved by showing that the party knew his statements to be false; or that, having no knowledge as to their truth or falsity, either he did not believe them to be true or he represented them to be true of his own knowledge." *Swanson v. Domning*, 86 N.W.2d 716, 720 (Minn. 1957). Also, "it [is not] necessary to prove that defendants knew the representations were false." *Id.* Further, "[a]n unqualified affirmation amounts to an affirmation of one's own knowledge"; and "[i]t is immaterial whether a statement made as of one's own knowledge is made innocently or knowingly." *Id.* Even if the representation was a mistake, then it may still support a cause of action for fraud. *Lewis v. Citizens Agency of Madelia, Inc.*, 235 N.W.2d 831, 834 (Minn. 1975); *Swedeen v. Swedeen*, 134 N.W.2d 871, 875 (Minn. 1965). Further, if the defendant should have known that the statement was false, then liability for fraud will still lie. *Carstedt v. Grindeland*, 306 N.W.2d 105, 110 (Minn. 1981).

The fraction of the asset value of Compayne to which Lily was entitled was a fact concerning her estate. *Winston v. Young*, 49 N.W. 521 (Minn. 1891). A misrepresentation regarding the status of her estate can support an action for fraud. *Id.*

III. The Procedural Posture of this Case

On March 20, 2005, Petitioner filed a Complaint in the United States district court for Minnesota, seeking relief in the form of voiding the contract underlying the 1999 Transaction and for money damages. In the Complaint, Petitioner alleged that Louis Coen, Compayne, and other defendants, misrepresented three material facts to Edward Coen with the intent to convince Edward to sell his 42% shareholding for about 7% of the asset value of Compayne. Those three material facts ("the Three Facts") were: (1) that Lily Coen was entitled to 50% of the asset value of Compayne; (2) that the value of Compayne was about £1,200,000 in 1996; and, (3) that Edward could not access more than about 21% of the asset value of Compayne. Petitioner adduced evidence onto the record demonstrating that each of these three material facts were false, and that the Respondents either knew or should have known that the facts were false.

The district court dismissed this case for want of personal jurisdiction on July 10, 2006. (App. 22-83). Petitioner timely filed her Notice of Appeal on October 23, 2006. On November 1, 2006, after this case was already on appeal to the Eighth Circuit, Respondents sent a letter to the district court to change the record to indicate that Lily did not have an ownership interest in Compayne. With this letter, Respondents were tacitly admitting that Louis committed fraud when he represented that Lily was entitled to 50% of Compayne. Respondents attempted to use the district

court to further an additional scheme to defraud Petitioner of her property in the United Kingdom. In response, on November 22, 2006, Petitioner filed a Rule 60(b) Motion. On December 21, 2006, the district court denied the Motion stating that: if Petitioner "wants to protect that court [in the United Kingdom] from being misled, she should submit papers there, not here." (App. 20-21).

Petitioner filed a second appeal with the Eighth Circuit challenging the denial of the Rule 60(b) Motion. The Eighth Circuit upheld the decision of the district court on both personal jurisdiction and the Rule 60(b) motion. (App. 1-13). The Eighth Circuit held that because of what Edward Coen, the victim of the fraud, did, said, and purportedly believed, then Petitioner had failed to support her claim of fraud and, therefore, jurisdiction was improper. (App. 10-12). That is, the Eighth Circuit made the issue of personal jurisdiction turn only upon the actions of the victim and not upon the actions of the Respondents. *Id.*

A timely Petition for Rehearing by the Panel or for Rehearing En Banc was also denied. (App. 84-88). This Court should now consider the Petitioner's claim that the Respondents committed fraud upon Edward in light of the following: (1) the conflict of the Eighth Circuit with the decisions of this Court; (2) the conflict of the Eighth Circuit with the other Circuits; (3) the Eighth Circuit violated the Tenth Amendment by creating a new, federal, common-law tort of fraud; and (4) the jurisprudence of the Eighth Circuit in this

case is so far from reasonable and normal jurisprudence that this Court must exercise its supervisory powers. The Court is now presented with the opportunity to reverse the opinion of the Eighth Circuit that a foreign national may defraud with impunity a resident of Minnesota, in a share transaction, if that resident either initiates or participates in discussions leading to the share transaction.

REASONS FOR GRANTING THIS PETITION

This Petition raises the following fundamental issue: whether a unique and special set of federal procedural and substantive laws apply in a fraud case where the defendant is a foreign national as opposed to being a resident of the United States. The courts below resolved this issue in the positive.

After *Coen*, then, if a shareholder initiates a discussion to sell his shares in a foreign corporation, and expresses a desire to sell, then personal jurisdiction will not lie in a court in the Eighth Circuit independent of the subsequent actions of the defendant.. This decision of the Eighth Circuit opens every shareholder, who wants to sell his shares in a foreign company, to fraudulent activity by a foreign buyer and prevents any recourse by the seller except, possibly, in a foreign tribunal.

I. The Decisions Below in *Coen v. Coen*

The district court found no evidence to support jurisdiction because Edward had initiated and actively participated in the discussions leading to the sale of his shares. (App. 70-73). Also, the district court found no evidence of fraud because Edward could not have reasonably relied upon Louis' representations. (App. 70-78). In particular, the district court found no evidence of fraud because Edward believed that Lily had a "moral" entitlement to 34% of Compayne in addition to her "legal" entitlement to 16%. (App. 74-77). Also, the district court found that if the victim of a fraud does not obtain his own valuation of property, which is more than 4000 miles distant, then a defendant's misrepresentations about the value of that property are not actionable. (App. 77-78).

The Eighth Circuit affirmed the opinion of the district court because, in part, the inconvenience to defendants who are foreign nationals "militat[es] heavily against" jurisdiction. (App. 11). The Eighth Circuit also found that this cause of action did not arise from any contacts of Respondents with the State of Minnesota because Edward sought to sell his shares and "Louis attempted to delay Edward from selling his shares." (App. 10). Further, the Eighth Circuit found that personal jurisdiction could not lie because: Edward initiated the contact with Louis and Compayne to sell his 42% shareholding in Compayne; Edward insisted upon selling his shares as soon as possible; and, Edward had failed to obtain his own valuation of the company. (App. 10-12). That is, the

Eighth Circuit found that because of the actions, omissions, and purported beliefs of Edward, personal jurisdiction in Minnesota was improper. *Id.* Nowhere did either court consider the "intentional, and allegedly tortious, actions" of Louis and Compayne.

In reaching its decision, the district court took care to omit from consideration every piece of evidence demonstrating that Louis either directly misrepresented the Three Facts or allowed Edward to act based upon misleading statements. (App. 70-83). In turn, the Eighth Circuit also failed to either refer to or consider any of Petitioner's allegations of fact and evidence. (App. 1-13). Rather, the courts below considered only whether Edward had reasonably relied upon Louis' statements.

II. The Eighth Circuit's Decision Conflicts with the *Asahi* and *Burger King* Decisions

Petitioner bears the burden of establishing that the nature and quality of Respondent's contacts with the forum state satisfy due process and that the cause of action arose out of those contacts. *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 474-475 (1985). Once Petitioner has met this burden, the burden of proof shifts to the Respondents to demonstrate that jurisdiction would be unreasonable. *Id.* at 477. Under the *Burger King* rule, then, Respondents "must present a compelling case" that the assertion of jurisdiction would be unreasonable by showing that litigating in the forum state is "'so gravely difficult

and inconvenient' that a party [Respondents] unfairly is at a 'severe disadvantage' in comparison to his opponent [Petitioner]." *Id.* at 477-478. In the instant case, the burden of proof upon the Respondents is not eliminated simply because they are foreign nationals. *Asahi Metal Industry Co., Ltd. v. Superior Court of California*, 480 U.S. 102, 114 (1987). Rather, the courts must recognize that "[t]he unique burdens placed upon one who must defend oneself in a foreign legal system should have significant weight in assessing the reasonableness" of asserting jurisdiction. *Id.* However, once "minimum contacts have been established, often the interests of the plaintiff and the forum in the exercise of jurisdiction will justify even the serious burdens placed on the alien defendant." *Id.* This Court has also stated that causing a foreseeable injury in the forum State makes it presumptively reasonable to assert jurisdiction.[2] *Burger King*, 471 U.S. at 480. The *Calder* Court so understood when it held that jurisdiction over a non-resident defendant was proper if that defendant committed an intentional tort, though resident in a foreign state, the effects of which were felt in the forum state. *Calder v. Jones*, 465 U.S. 783, 788-790 (1984).

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[2] Petitioner does not imply that the foreseeability of an injury in the forum state is sufficient to establish minimum contacts: rather, only that the foreseeability of an injury creates a presumption that jurisdiction over the Respondents is reasonable.

In direct conflict with the "minimum contacts" test established by the *Burger King* and *Asahi* Courts, the Eighth Circuit created the new rule that: the inconvenience imposed upon a foreign national, by requiring him to answer for causing injuries in the forum state, "militat[es] heavily against" jurisdiction. (App. 11). This is also in conflict with the reasoning of this Court that a resident of the forum state should not have to go to a foreign state [or foreign country] to seek a remedy for an injury that occurred in the forum state caused by "intentional, and allegedly tortious, actions" taken in that foreign state [or foreign country]. *Calder*, 465 U.S. at 790; *McGee v. International Life Insurance Co.*, 355 U.S. 220, 221 (1957).

The other Circuit Courts of Appeals follow the *Asahi* rule that jurisdiction is not precluded simply because a defendant is a foreign national. *Dole Food Co., Inc. v. Watts*, 303 F.3d 1104, 1115 (9th Cir. 2002) (stating that the burden upon the defendant of litigating in the forum State was not dispositive of the issue of personal jurisdiction). Further, other Circuits allow that even a heavy burden on a foreign national will "rarely justify a determination against jurisdiction." *Purdue Research Foundation v. Sanofi-Synthelabo, SA*, 338 F.3d 733, 781 (7th Cir. 2003); *ESAB Group, Inc. v. Centricut, Inc.*, 126 F.3d 617, 627 (4th Cir. 1997) (stating that defendants failed to show any extreme inconvenience or unfairness); *Dole Food Co., Inc.*, 303 F.3d at 1115; *Republic of Panama v. BCCI Holdings (Luxembourg), S.A.*, 119 F.3d 935, 947 (11th Cir. 1997). These Circuits have recognized the

strength of this rule particularly when the plaintiff has demonstrated that the defendant established minimum contacts with the forum state. *Asahi*, 480 U.S. at 114.

Upon meeting her burden of demonstrating that Respondents "purposefully established minimum contacts within the forum State," *Burger King*, 471 U.S. at 467, the courts must give considerable deference to Petitioner's choice of forum. *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 508 (1947). The Respondents then bear a heavy burden of proving that defending in the Petitioner's chosen forum is so "unnecessarily burdensome" as to constitute an "exceptional circumstance." *Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 255 n.23 (1981); *Koster v. (American) Lumbermans Mutual Casualty Co.*, 330 U.S. 518, 524 (1947). The Respondents never attempted such a showing and the courts below did not require that Respondents do so: rather, the Eighth Circuit required Petitioner to bear the burden of proving that the inconvenience to the Respondents did not rise to an unconstitutional level. (App. 3, 11). This is in direct conflict with the Fourth and Eleventh Circuits, which required the defendant to demonstrate a constitutionally significant inconvenience, and asserted jurisdiction when the defendant made no such showing. *ESAB Group, Inc.*, 126 F.3d at 627; *Republic of Panama*, 119 F.3d at 948.

Justice Scalia has stated that the *forum non conveniens* doctrine is to be used "only in cases where the alternative forum is abroad." *American Dredging Co. v. Miller*, 510 U.S. 443, 449 n.2 (1994). That is,

Justice Scalia contemplated that the issue of convenience of the forum state should be determined under the *Gilbert* Test in cases where the defendant was a foreign national. Without reaching the *Gilbert* Test, the Eighth Circuit held that where the defendant is a foreign national the inconvenience of defending in the forum state "is a significant factor militating heavily against" asserting personal jurisdiction. This statement sets the Eighth Circuit in direct conflict with the *Gilbert*, *Piper Aircraft*, and *American Dredging* Courts.

Rather than requiring Respondents to prove that jurisdiction would be unreasonable, the courts below merely presumed that jurisdiction was unreasonable because Respondents were foreign nationals. In doing so, the Eighth Circuit violated the constitutional rights of the Petitioner and the State of Minnesota and set itself in direct conflict with this Court. The Due Process Clause of the Fourteenth Amendment requires that Respondents "purposefully established minimum contacts within the forum State." *Burger King*, 471 U.S. at 467. It is a direct consequence of the operation of the Due Process Clause that the burden is upon the Petitioner to show that Respondents have established such minimum contacts. Beyond that, Petitioner has no further obligations under the constitution. If Respondents wish to avoid jurisdiction, then they must show that jurisdiction is unconstitutional. *Asahi*, 471 U.S. at 477.

The Tenth Amendment expressly reserved all powers to the several States not otherwise explicitly

granted to either the federal government or to the people. Included in those powers is the police power to protect the residents of a state against injury from a non-resident defendant. If a defendant wishes for the federal courts to remove that police power in a particular case, then that defendant must demonstrate an overwhelming reason for doing so. *Burger King*, 471 U.S. at 476. Also, where the defendant has derived a benefit from his interstate activities, then it is "unfair to allow . . . [him] to escape having to account in other States for consequences that arise proximately from such activities." *Id.* at 473-474.

The Fourteenth Amendment guarantees the residents of a State equal protection, including a resident that has been injured due to the actions of a non-resident defendant. By avoiding jurisdiction, a defendant is removing that protection. He must, therefore, show that the weight of the due process rights for him overwhelms the equal protection rights for the plaintiff and the Tenth Amendment protection of the police power of the state. *World-Wide Volkswagen Corporation v. Woodson*, 444 U.S. 286, 292 (1980) (stating that: "the burden on the defendant, while always a primary concern, will in an appropriate case be considered in light of . . . the State's interest in adjudicating the dispute . . . [and] the plaintiff's interest in obtaining convenient and effective relief"). Since it is the Respondents who are affecting the constitutionally protected rights of the Petitioner and the State, then the burden must be upon them to prove that those rights must be violated. For

the Eighth Circuit to place the burden upon the Petitioner to establish a case of personal jurisdiction, including showing convenience of the forum State, is to place a burden upon her that is beyond that required by either this Court or the Constitution.

III. The Eighth Circuit's Decision Conflicts with *International Shoe* and the *Shaffer* Doctrine

The district court relied upon a misinterpretation of Minnesota case law to reach the conclusion that the identity of "the aggressor in a transaction is important in assessing personal jurisdiction." (App. 72). In turn, the Eighth Circuit found that, since Edward initiated the discussions to sell his shares, then Louis did not make contacts with the State of Minnesota. (App. 10). That is, the courts below assumed that Minnesota law stands for the proposition that: whether a defendant "solicited contacts with a Minnesota resident or having initiated or induced the transaction out of which the cause of action arises" is dispositive of the issue of the nature and quality of the defendant's contacts with the forum state. *Marquette National Bank of Minneapolis v. Norris*, 270 N.W.2d 290, 296 (Minn. 1978). The courts below were wrong for three reasons.

First, even if the interpretation ascribed by the courts below to Minnesota procedural due-process law is correct, that interpretation conflicts with the *International Shoe* line of cases. The *International*

Shoe line of cases stands for the proposition that due process depends upon "the quality and nature of the activity [of the defendant] in relation to the fair and orderly administration of the laws." *International Shoe Co. v. State of Washington*, 326 U.S. 310, 319 (1945). To identify the "quality and nature of the activity," *id.*, "it is essential in each case that there be some act by which the defendant purposefully avails itself of the privilege of conducting activities within the forum state." *Hanson v. Denckla*, 357 U.S. 235, 254 (1958). That is, the inquiry into personal jurisdiction must turn on the "relationship among the defendant, the forum, and the litigation" ("*Shaffer* Doctrine"). *Shaffer v. Heitner*, 433 U.S. 186, 204 (1977). In an intentional tort case that "relationship among the defendant, [and] the forum" must be evaluated only by considering the "intentional, and allegedly tortious, actions" of the defendant. *Calder*, 465 U.S. at 789. Thus, the *International Shoe* line of cases holds that the issue of jurisdiction in an intentional tort case must be decided based only upon the actions of the defendant, not those of the plaintiff.

In conflict with these due process fundamentals, the Eighth Circuit considered none of the "intentional, and allegedly tortious, actions" of Louis and Compayne. Rather, the Eighth Circuit centered the inquiry into the nature and quality of the contacts strictly upon the actions of Edward by considering only that "Edward initiated the contact, expressing a desire to liquidate his shares." (App. 10). Also, the Eighth Circuit centered the inquiry into the connection

of the action with the contacts only upon the actions of Edward by considering that "Louis attempted to delay Edward from selling his shares," that "Edward sought to sell his shares," and that Edward "insisted upon selling his shares as soon as possible." (App. 10-11). That is, in determining whether the cause of action arose out of the contacts with the forum state, the Eighth Circuit considered only the actions of Edward and whether those actions were reasonable. Instead of determining whether the Respondents committed an intentional tort, as required by the *Calder* Court, the Eighth Circuit considered only whether Edward obtained his own valuation of the company, set a price for his shares, and insisted on selling those shares. (App. 12); *Calder*, 465 U.S. at 788-789.

Second, the courts below erroneously interpreted the Minnesota due-process law as holding that if a defendant initially made contact with the forum state through the actions of the plaintiff then jurisdiction is improper. In so assuming, the courts below conflicted with the Minnesota courts by failing to recognize that Minnesota due-process law distinguishes between a breach-of-contract case and a fraud case. In breach-of-contract cases, Minnesota courts have given weight to the identity of the person who either initiated the discussions leading to the transaction or was aggressive in pursuing the transaction. *Real Properties, Inc. v. Mission Insurance Company*, 427 N.W.2d 665, 668 (Minn. 1988) (stating that: if the non-resident defendant was the aggressor in a transaction then the

defendant likely had "fair warning" of being sued in Minnesota); *Dent-Air, Inc. v. Beech Mountain Air Service, Inc.*, 332 N.W.2d 904, 907-908 (Minn. 1983); *KSTP-FM, L.L.C. v. Specialized Communications, Inc.*, 602 N.W.2d 919, 924 (Minn.Ct.App. 1999) (stating that "whether the nonresident in some way solicited the sale or actively engaged in negotiating its terms" makes it "more likely . . . that personal jurisdiction is appropriate").

However, in a fraud case, the "crucial" issue is the "economic effect" that defendant's subsequent "purposeful acts created within Minnesota." *Marquette National Bank*, 270 N.W.2d at 296 (holding that the out-of-state actions of the defendant had an "economic effect" within Minnesota sufficient to establish jurisdiction). In a subsequent case, the Minnesota Court of Appeals stated that independent of which party is the initiator or aggressor, the jurisdictional inquiry must consider only the subsequent actions of the defendant. *Viking Engineering & Development, Inc. v. R.S.B. Enterprises, Inc.*, 608 N.W.2d 166, 170 (Minn.Ct.App. 2000). In view of these Minnesota cases, it is clear that Minnesota courts base the jurisdictional inquiry upon the actions of the defendant and not merely upon the mechanical test of which party was the initiator. This view conforms to that articulated by the *Burger King* Court. *Burger King*, 471 U.S. at 478.

Third, the courts below conflicted with this Court by supplanting federal due-process law for a fraud case with state due-process law for a breach of contract case.

Wayman v. Southard, 10 Wheat. (23 U.S.) 1 (1825); *Bank of the United States v. Halsted*, 10 Wheat. (23 U.S.) 51 (1825). In the absence of well-established federal procedural law, the procedural law of the forum state may be given some weight in a particular case. *Pulson v. American Rolling Mill Co.*, 170 F.2d 193 (1st Cir. 1948); *Ark-La Feed & Fertilizer Co. v. Arco Chemical Co.*, 292 F.2d 197 (8th Cir. 1961); *Vasser v. Raines*, 274 F.2d 369, 371 (10th Cir. 1959). However, the procedural law by which a federal court may assert jurisdiction over a non-resident defendant has long been well established. In a federal intentional tort case, the courts must consider only the action of the defendant, not of the victim. *Keeton v. Hustler Magazine, Inc.*, 465 U.S. 770, 775 (1984); *Calder*, 465 U.S. at 787. This is because the personal jurisdiction inquiry must focus upon the relationship amongst the defendant, the forum, and the litigation: not upon the victim, as the lower courts reasoned. *Shaffer*, 433 U.S. at 204. Federal procedural law prohibits the inquiry into the actions of the plaintiff from becoming dispositive of the issue of personal jurisdiction. By adopting Minnesota procedural due-process law, the lower courts have, therefore, abandoned "the principle that minimum contacts must be based on an act of the defendant." *Asahi*, 480 U.S. at 109.

IV. The Eighth Circuit's Decision Violates the Tenth Amendment and Conflicts with the *Erie* Doctrine

It is a fundamental principle of federalism that the police power to define the substantive law of torts remains with the States. *Iasigi v. Brown*, 58 U.S. 184, 184 (1854); Tenth Amendment; *Elkhart Engineering Corp. v. Dornier Werke*, 343 F.2d 861, 867 (5th Cir. 1965). In respect of this federalist principle, this Court has been clear that "[t]here is no federal general common law." *Erie Railroad Co. v. Tompkins*, 304 U.S. 64, 78 (1938). Since *Erie*, federal courts sitting in diversity jurisdiction must apply the substantive law of the forum state. The decisions of the courts below conflict with the *Erie* decision and the Tenth Amendment because the courts below created a new, federal, common-law tort of fraud.

The Eighth Circuit affirmed the decision of the district court. (App. 1). In denying jurisdiction, the district court created a new, federal, common-law tort of fraud in which a misrepresentation regarding a "moral" obligation cannot support a cause of action for fraud while a misrepresentation regarding a "legal" obligation may support such a cause of action. (App. 74-77); Document 129, at 7; JA 665-666; Document 140 at 7-8. There is no such law in any State within the United States, and certainly not in the State of Minnesota.

The district court held that if a plaintiff does not obtain her own valuation of the property involved in a

transaction, then a cause of action for fraud cannot lie. (App. 77-78). In affirming the decision of the district court, the Eighth Circuit found no evidence of fraud because Louis told Edward that other valuations of Compayne could have been obtained.[3] (App. 12). In essence, then, the courts below held that Edward could not have reasonably relied upon Louis' representations regarding the value of Compayne because Louis told Edward that other valuations could be obtained and Edward failed to obtain such valuations. (App. 12, 78). The holdings of both courts below are in direct conflict with the law in Minnesota that a plaintiff has a right to rely upon the representations of the defendant regarding the value of property. *Davis*, 149 N.W.2d at 39; *Spiess v. Brandt*, 41 N.W.2d 561, 566 (Minn. 1950); *Brown v. Andrews*, 133 N.W. 568, 570 (Minn. 1911); *Wilder v. De Cou*, 18 Minn. 470 (Minn. 1872). Under Minnesota law, a plaintiff need not make an independent investigation to determine the truth of the representations. *Davis*, 149 N.W.2d at 39. This is especially true where, as here, the defendant has superior knowledge about the property to which the plaintiff does not have access, *Hollerman v. F. H. Peavey & Co.*, 130 N.W.2d 534, 540 (Minn. 1964); *Vulcan Metals Co. v. Simmins Manufacturing Co.*, 248 F. 853, 856 (2nd Cir. 1918), and the

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[3] By failing to correctly quote from the critical language, the Eighth Circuit was able to circumvent evidence demonstrating that Louis was actually representing to Edward that Edward could rely upon a "professional estimate" provided by Louis. JA 471-473.

defendant was making an affirmative representation about properties that were not his own, *Busterud v. Farrington*, 31 N.W. 360 (Minn. 1887). Indeed, under Minnesota law, if the plaintiff does conduct an independent valuation, a cause of action for fraud will not lie. *Davis*, 149 N.W.2d at 39.

The district court also held that if a plaintiff initiates the discussions leading to the transaction in issue, participates in those discussions, considers other factors in addition to those alleged to have been misrepresented,[4] or accepts the terms of the transaction, then a cause of action for fraud cannot be supported. (App. 70-79). The Eighth Circuit agreed with the district court, finding no evidence of fraud and, therefore, no basis for jurisdiction because Edward initiated the discussions leading to the transaction and had wanted to sell his shares, had set the price for his shares, and executed the transaction. (App. 10, 12). The evidence demonstrates that Edward agreed with the price because Louis had represented the value of the company as being £1,200,000 and that Edward could access only about 25% of that value. Even if Edward did set the price, under the circumstances of this case, Louis had the duty to inform him of the correct value and Edward had the right to know that value. *Klein v. First Edina National Bank*,

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[4] In Minnesota, a plaintiff may have considered factors in addition to the misrepresentations and still have been defrauded. *Davis v. Re-Trac Manufacturing Corp.*, 149 N.W.2d 37, 38-39 (Minn. 1967).

196 N.W.2d 619, 622 (Minn. 1972). Louis failed to do so and, therefore, committed fraud by omission. In summary, both courts below held that if a plaintiff participates in and agrees to the terms of a transaction with a foreign national then that plaintiff cannot "allege and demonstrate an intentional tort" of fraud. (App. 12). It is the very essence of fraud that the victim participates in the discussion leading to the fraudulent transaction and that the victim accepts the terms of the transaction: without at least these two steps, there can be no transaction and, therefore, no fraudulent transaction. The courts below, in creating this new, federal, common-law tort of fraud, have abolished the cause of action of fraud in Minnesota.

In Minnesota, an intent to deceive is no longer necessary. *Swanson v. Domning*, 86 N.W.2d 716, 720 (Minn. 1957). With repeated emphasis on the word "intentionally," the district court found no evidence that Louis had "*intentionally* misrepresented" the Three Facts to Edward and, therefore, jurisdiction was improper. (App. 74-77). The district court, therefore, required evidence that Louis made the misrepresentations by design or purpose, *see Webster's Third New International Dictionary*, 1176 (2002); namely, that Louis had the intent or design to deceive Edward. In so requiring, the district court created a new, federal, common-law tort of fraud that is in direct conflict with the law in Minnesota.

V. The Eighth Circuit's Decision Conflicts with the *Anderson* Doctrine and with the Decisions of Other Circuit Courts of Appeals

The courts below omitted from consideration every scintilla of evidence and allegation of fact that supports the assertion of personal jurisdiction. While both courts quoted extensively from the correspondence that was on the record, and the language quoted by these two courts appears to convincingly support the decisions of these courts, both courts failed to recognize or analyze any of the evidence that supports Petitioner's claims of fraud and fraud by omission. By way of example, consider Petitioner's claim that Louis misrepresented that Lily was "entitled" to 50% of the asset value of Compayne. In his January 18, 1996 letter to Edward, Louis stated that: Victor "wanted that 50% of his estate" be reserved for Lily; "this forecloses the idea of you or us now selling out more than about 1/2 of our shares"; and "Lily has already 1/16 of the total." JA 244. The only way that these three statements can be reconciled is that Louis was representing that 50% of Compayne was to be reserved for Lily, JA 509, 623-631, and Edward believed that that is what Louis had represented. JA 248, 279. On January 25, 1996 Edward asked Louis to clarify whether Lily was entitled to one-third of Compayne. JA 248. Louis responded with an unqualified affirmation that Lily was entitled to 50%. JA 279. Edward accepted that affirmation as true and changed his understanding to believe that "the correct fraction

= 1/2." JA 248. The evidence demonstrates that Louis knew that, at most, Lily held only a beneficial interest in 16% of the income from Compayne. JA 163, 243, 279, 903. Neither the district court nor the Eighth Circuit considered any of the aforementioned relevant language that demonstrates that Louis made the misrepresentations and that Edward believed him. It was, therefore, impossible for either court to properly determine whether "there is sufficient evidence favoring the . . . [Petitioner] for a jury to return a verdict for" the Petitioner. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249 (1986).

The issue before the Court, then, is whether a court may properly deny personal jurisdiction when it has failed to consider any of a plaintiff's evidence in support of jurisdiction. It is well settled that in deciding a Rule 12(b)(2) Motion, the courts below must consider all of plaintiff's allegations of fact as true, view the evidence in a light most favorable to the plaintiff, and to resolve all factual conflicts in favor of the plaintiff. *Chem Lab Products, Inc. v. Stepanek*, 554 F.2d 371, 372 (9th Cir. 1977); *Madara v. Hall*, 916 F.2d 1510, 1514 (11th Cir. 1990). Since the Petitioner has the burden of proving that Respondent "purposefully established minimum contacts within the forum State," *Burger King*, 471 U.S. at 467, then she must produce evidence to support her allegations of fact contained in the Complaint. Petitioner accepts that the touchstone of the jurisdictional inquiry is facts. *Taylor v. Portland Paramount Corp.*, 383 F.2d 634, 639 (9th Cir. 1967).

The *Anderson* Court required that the nonmoving party in a motion for summary judgment must present evidence and set forth facts to show that a genuine issue exists for trial. *Anderson*, 477 U.S. at 250. At the pre-trial stage, however, "the judge's function is not himself to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial." *Id.* at 249. An issue exists for trial when "there is sufficient evidence favoring the nonmoving party for a jury to return a verdict for that party." *Id. Anderson*, then, requires that the courts below consider the evidence adduced onto the record by Petitioner when determining whether to assert personal jurisdiction. This the courts below did not do: rather, each of the courts below accepted the *defense* as true, and as showing the absence of any genuine issue of material fact. (App. 70-79). The district court then required that Petitioner show a genuine issue of fact material to the *defense*. (App. 74-75). Finally, after omitting all of Petitioner's allegations of fact and supporting evidence[5] of the "intentional, and allegedly tortious, actions" of the Respondents, the district court found that Petitioner did not produce evidence showing a genuine issue of fact that "Louis *intentionally* misrepresented" the Three Facts. (App. 77) (emphasis in original).

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[5] The district court expressly disregarded the Victor Coen Will, which was crucial to demonstrating that the representations as to Lily's entitlement to the asset value of Compayne were false.

By disregarding all of the evidence that was in support of Petitioner's case, the Eighth Circuit has acted so far outside of reasonable jurisprudence as to be extremely biased and prejudicial to Petitioner. It is for this reason that this Court must exercise its supervisory powers and correct the decisions made by the lower courts.

CONCLUSION

For the foregoing reasons, a writ of certiorari should be granted.

Respectfully submitted,

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United States Court of Appeals
FOR THE EIGHTH CIRCUIT

Nos. 06-3812/07-1210

Dr. Deborah R. Coen, Appellant, v. Louis Coen; Daniel Coen; Anita Ariella Coen; Carole M. Coen; Nicholas Jackson Clark; Peter John Bunker; Compayne (Hampstead) Limited; Trustees of the Victor Coen Will Trust; Trustees of the Miriam Coen Will Trust; Trustees of the Estate of Ms. Lily Coen; John Doe One; John Doe Two, Appellees.	* Appeal from the * United States District * Court for the District * of Minnesota

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Submitted: October 5, 2007
Filed: December 10, 2007

Before LOKEN, Chief Judge, RILEY and SMITH, Circuit Judges.

RILEY, Circuit Judge.

Deborah Coen (Coen), a resident of Minnesota, brought an action against defendants who reside in England and France, claiming the defendants defrauded her father, Edward Coen (Edward), in connection with certain shares Edward owned in a family-owned British company. Finding no personal jurisdiction over the foreign defendants, the district court[1] dismissed Coen's lawsuit. In these consolidated appeals, Coen now appeals the district court's decision. We affirm.

I. BACKGROUND

This family controversy arises out of a dispute between two brothers over the value of their ownership interests in their parents' business, Compayne (Hampstead) Limited (Compayne), an English corporation with its principal place of business and all of its assets in England. Victor and Miriam Coen (deceased) were citizens of Great Britain and were the parents of three children: Edward (now a citizen of Minnesota), Louis (now a resident of France), and Lily (deceased).[2] After Victor and Miriam Coen died,

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[1] The Honorable Patrick J. Schiltz, United States District Judge for the District of Minnesota, adopting the report and recommendation of the Honorable Susan Richard Nelson, United States Magistrate Judge.

[2] Lily was diagnosed with schizophrenia at about age 19, and she was institutionalized in Great Britain until her death in 2002.

all shares of Compayne were divided among their children. Edward and Louis each owned approximately 42% of the outstanding shares, and Lily owned the balance.

In July 1994, Edward communicated to Louis his desire to liquidate his shares. In November 1994, Edward changed his mind and wanted to postpone the sale of his shares. With respect to Edward's new decision to postpone the buyout, Louis wrote Edward stating:

> I understood in July that you wanted to cash-in your holding within the near future, so it is a sudden change that you want now to postpone it indefinitely.
>
> In the mean-time I am stopping my work here on the project [the purchase of Edward's shares] until I know better what you want to do.

Edward wrote back stating:

> I [am] willing to "accept" 36% of all Compayne assets (less Lily's share), giving you 48%. . . . Note: I do not expect to claim my share until perhaps 5 to 10 years from now.

Louis subsequently wrote:

> I have done . . . a case study supposing that you wished to exercise your option to sell out today. . . . Some of the figures are exact, others are not.

> [An] evaluation of the two properties (11/30/94) is £1,060,530 and we have approximately £200,000 in liquid assets. . . .
>
> If we take into account Lily's holding, the shares would be redistributed as follows:
>
> Value Ed's shares [ ] = £449,740
> Value Lou's shares [ ] = £599,483
> Value Lily's shares [ ] = £211,777
>
> Our liquid assets being around £200,000 we would have to take the decision to mortgage the property to borrow £249,740. . . .
>
> An alternative solution of financing the buyback would be to sell one of the properties, say the one in Compayne Gardens: Present day value of this property [ ] is £354,000.

Louis and Edward met in New York in late 1995 to discuss the sale of Edward's shares. The brothers agreed not to rush into any sale of Compayne's real estate because they foresaw real estate values rising. After the New York meeting in December 1995, Edward wrote to Louis stating:

> I think your trip to New York was very useful . . . on further thought, I am not as confident that we can count on a substantial increase in [Compayne's real estate] value in the short term. One reason is that the market can go down as well as up. . . . I now feel strongly that we should proceed promptly to clear the decks of this issue [Edward's buyout]. . . . I would

like to move toward an agreed document quite soon.

In January 1996, Louis wrote back saying:

I was so speechless by your letter announcing the sudden turn-around on what we all agreed to in N.Y. one month ago . . . In July '94 you indicated that you wanted to cash in on your holding in the near future. . . . Five months later . . . you changed your mind and you no longer needed the money now but would like to have an option to sell in 5-10 years . . . After a great deal of work and expenditure [ ] this turned out to be impractical, and you then returned to your original request to sellout of your holdings as soon as reasonably possible . . . This proved impractical also, and you agreed in N.Y. to the 3 year plan. A month later you reneg [sic] on that plan and announce that you want to sell your shares now ignoring the difficulties and the prejudice for the other shareholders pointed out in NY.

Edward subsequently wrote Louis:

I have been thinking some more about . . . changing the numbers in the direction that might make it more attractive from your point of view. . . . I am willig [sic] to take a further deduction in [my] share, from 36% to 33%. . . . I do want to clear the decks of this issue as soon as it reasonably can be accomplished.

Edward later met with his sons and informed them he effectively wanted to limit his claim to only 25% of the gross asset value of Compayne, which was approximately £300,000. Edward wrote to his sons stating:

> I have never really appreciated the magnitude of the effort that [Louis] has devoted over the last twenty five years to converting [one of Compayne's properties] from a zero profit rent controled [sic] enterprise into a high profit operation. . . . Moreover, during the last ten years of Miriam's life [Louis] had to manage all her financial affairs; oversee the details of the administration of her estate and oversee the selling of her house. And for the last fifteen years he has in effect serve[d] as a parent for Lily . . . [Louis] was carrying an unusual burden. . . . My number might be 42% of the shares, but my contribution to their value was zero. . . . My 42% of the shares grossly overstates my entitlement.

Edward's sons, acting as intermediaries, then related to Louis by facsimile that Edward wished to take 25% or approximately £300,000 for the shares. Edward's sons explained their father "was very upset" he and Louis "had quarreled," and was "anxious to resolve this on *any* terms simply to put the quarrel behind him."

Louis subsequently wrote Edward:

> We suggest that the transaction takes place in January or February, 1999. Is this O.K.? As to the current value, you proposed £300,000 . . . Do you still agree to this?
>
> Our agent [ ] gave a professional estimate [ ] of the property value based on current values of similar apartments in the same area. . . . We can ask for other evaluations.

In 1999, for approximately £285,000, the buyout of Edward's shares took place. In 2005, Coen filed an action against the defendants for fraud.[3] The family defendants reside in France, and the trustee defendants reside in England and France. Defendants countered with a motion to dismiss for lack of personal jurisdiction, and the district court granted defendants' motion.[4] This appeal followed.

II. DISCUSSION

We review de novo a motion to dismiss for lack of personal jurisdiction, and the nonmoving party needs only make a prima facie showing of jurisdiction. *See*

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[3] The parties do not dispute Coen's assertion that Edward assigned this action to her, thus, Coen is the real party interest.

[4] Although defendants filed their motion to dismiss also under Fed. R. Civ. P. 12(b)(6), (e), (f); Fed. R. Civ. P. 8; and a theory of forum non conveniens, "the parties [in their briefs] treated the matter as one of [personal] jurisdiction, and so will we." *Radaszewski by Radaszewski v. Telecom Corp.*, 981 F.2d 305, 307 (8th Cir. 1992).

Dakota Indus., Inc. v. Dakota Sportswear Inc., 946 F.2d 1384, 1387 (8th Cir. 1991). If jurisdiction is controverted, the plaintiff has the burden of proving facts supporting personal jurisdiction. *Dever v. Hentzen Coatings, Inc.*, 380 F.3d 1070, 1072 (8th Cir. 2004). "The plaintiff's 'prima facie showing' must be tested, not by the pleading alone, but by the affidavits and exhibits presented with the motions and opposition thereto." *Id.* (quotation and citation omitted).

"A federal court may assume jurisdiction over [ ] foreign defendant[s] only to the extent permitted by the forum state's long-arm statute and by the Due Process Clause of the Constitution." *Dakota Indus., Inc. v. Ever Best Ltd.*, 28 F.3d 910, 915 (8th Cir. 1994). Minnesota's long-arm statute confers jurisdiction to the fullest extent permitted by the Due Process Clause. *Johnson v. Woodcock*, 444 F.3d 953, 955 (8th Cir. 2006). The Due Process Clause requires "minimum contacts" between the nonresident defendant and the forum state before the court may exercise jurisdiction over the defendant. *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 291 (1980).

"Sufficient contacts exist when the defendant's conduct and connection with the forum state are such that he should reasonably anticipate being haled into court there, and when maintenance of the suit does not offend traditional notions of fair play and substantial justice." *Bell Paper Box, Inc. v. U.S. Kids, Inc.*, 22 F.3d 816, 818 (8th Cir. 1994) (quoting *Soo Line R.R. Co. v. Hawker Siddeley Canada, Inc.*, 950

F.2d 526, 528-29 (8th Cir. 1991)). By defendant's reasonable anticipation, we mean "there must be some act by which the defendant purposefully avails itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws." *Id.* at 818-19. We have set "a five-part test for measuring minimum contacts: (1) the nature and quality of the contacts with the forum state; (2) the quantity of those contacts; (3) the relation of the cause of action to the contacts; (4) the interest of the forum state in providing a forum for its residents; and (5) the convenience of the parties." *Id.* at 819. Factors one through three are primary. With respect to the third factor, we distinguish between specific jurisdiction and general jurisdiction. *Id.* "'Specific jurisdiction refers to jurisdiction over causes of action arising from or related to a defendant's actions within the forum state,' while '[g]eneral jurisdiction . . . refers to the power of a state to adjudicate any cause of action involving a particular defendant, regardless of where the cause of action arose.'" *Id.* (quoting *Sondergard v. Miles, Inc.*, 985 F.2d 1389, 1392 (8th Cir. 1993)).

Because Coen does not contend the basis for personal jurisdiction is the "continuous and systematic" contacts with the forum state, that is, general jurisdiction, *Johnson*, 444 F.3d at 956, we consider whether specific jurisdiction exists over the defendants. In doing so, "[a]t a minimum . . . we will consider the last two of the primary factors – the nature and quality of the contacts, and [their] source and

connection to the cause of action." *Lakin v. Prudential Sec., Inc.*, 348 F.3d 704, 712 (8th Cir. 2003) (internal quotation marks omitted).

With respect to the nature and quality of the contacts by defendants (who reside in either England or France) with the forum state (Minnesota), the defendants virtually had no contact with the forum state. The only relevant contact was the correspondence between Edward and Louis, and the correspondence occurred only because Edward initiated the contact, expressing a desire to liquidate his shares. The brothers had only one personal business contact, and that contact occurred in New York, not Minnesota.[5]

With respect to the connection of the cause of action to the contacts, we cannot say this cause of action arises from or is related to the defendants' actions within Minnesota. The record simply does not disclose defendants, with the exception of Louis, communicated with Edward. Although Louis and Edward communicated several times via mail, those contacts occurred only because Edward sought to sell his shares in the foreign, family run business. The record shows Louis attempted to delay Edward from selling his shares, but Edward frequently changed his

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[5] Some of the family defendants visited Minnesota on a few occasions during this time, but the visits were for a wedding, a fiftieth wedding anniversary, a hospital visit, and a funeral. None of these visits involved Compayne business or the buyout negotiations.

mind and eventually insisted upon selling his shares as soon as possible. Nothing in the record indicates Louis, or any other defendant for that matter, purposely availed himself of the privilege of conducting activities within Minnesota, and invoking the benefits and protections of Minnesota's laws. The defendants, including Louis, could not have reasonably anticipated being haled into a Minnesota court for this dispute over the English corporation's share valuation.

Furthermore, although Minnesota has an interest in providing a forum to its residents, it would be substantially inconvenient and extremely burdensome to require all defendants, and their witnesses, to travel from France or England to Minnesota to resolve Coen's allegations. The inconvenience to the parties, under the facts of this case, is a significant factor militating heavily against Coen for purposes of establishing personal jurisdiction over the foreign defendants. *See St. Jude Med., Inc. v. Lifecare Intern., Inc.*, 250 F.3d 587, 591 (8th Cir. 2001) ("Even if the minimum contacts threshold is established, personal jurisdiction may be defeated if its exercise would be unreasonable considering such factors as [ ] the burden on the defendant[s]").

In an effort to establish personal jurisdiction, Coen asserts defendants committed an intentional tort (fraud) warranting personal jurisdiction over the defendants. Coen's claim of jurisdiction is based on the " 'effects' test that allows the assertion of personal jurisdiction over non-resident defendants whose acts

are performed for the very purpose of having their consequences felt in the forum state." *Finely v. River North Records, Inc.*, 148 F.3d 913, 916 (8th Cir. 1998) (referring to *Calder v. Jones*, 465 U.S. 783, 789 (1984)). Specifically, Coen alleges defendants provided false information regarding the assets of Compayne and Edward relied on this false information in his decision to sell his shares. The record indicates, however, Louis told Edward (a retired professor of economics) that additional evaluations of Compayne's assets could be obtained. The record also indicates Louis attempted to delay Edward from selling his shares. It was only when Edward insisted on selling his shares and set a price that a deal for the buyout of Edward's shares was executed. Coen fails to allege and demonstrate an intentional tort in which Minnesota would have a strong interest to remedy. Without deciding the merits of Coen's fraud claim, for our personal jurisdiction review, Coen's allegations fail to support sufficiently a claim of fraud with material consequences felt in Minnesota.

In a motion for relief from final judgment under Fed. R Civ. P. 60(b), Coen claimed Edward did not know Lily's true interest in the company nor did he know the true assets of Compayne when he sold his shares. As the district court noted, the correspondence undisputedly indicates what Edward considered important were liquidity and tax consequences, as well as Louis's contributions to the company, and to the care of their mother, Miriam, and their sister, Lily. Furthermore, the correspondence clearly establishes

Edward set the price for the buyout. Based on these relevant factors, we find no abuse of discretion in the district court's denial of Coen's Rule 60(b) motion. *See Noah v. Bond Cold Storage*, 408 F.3d 1043, 1045 (8th Cir. 2005) (declaring a decision to grant or deny a Rule 60(b) motion lies with the district court, does not raise the underlying judgment, and is reviewed only for an abuse of discretion).

III. CONCLUSION

The district court properly granted defendants' motion to dismiss. We affirm the district court's thorough and well reasoned opinion and judgment finding no personal jurisdiction over the defendants. Coen's claims are dismissed without prejudice.

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

DEBORAH R. COEN, Plaintiff, v. LOUIS COEN, DANIEL COEN, ANITA ARIELLA COEN, CAROLE M. COEN, NICHOLAS JACKSON CLARK, PETER JOHN BUNKER, COMPAYNE (HAMSTEAD) LIMITED, Trustees of the VICTOR COEN WILL TRUST, Trustees of the MIRIAM COEN WILL TRUST, Trustees of the ESTATE OF LILY COEN, JOHN DOE one, and JOHN DOE, two, Defendants.	Civil No. 05-596 (PJS/RLE) ORDER ADOPTING REPORT AND RECOMMENDATION (Filed Sept. 22, 2006)

Nathan A. Busch, BUSCH LAW FIRM, 7601 Wayzata Boulevard, Suite 207, Saint Louis Park, MN 55426, for plaintiff.

Bryan Keane, Christopher Shaheen, and Michael Skoglund, DORSEY & WHITNEY LLP, 50 South Sixth Street, Suite 1500, Minneapolis, MN 55402, for defendants.

This matter is before the Court on plaintiff Deborah R. Coen's objections to the July 10, 2006,

Report and Recommendation ("R&R") of Magistrate Judge Susan R. Nelson.

Judge Nelson's R&R recommends dismissal of this case, without prejudice, based on the Court's lack of jurisdiction over the defendants, all of whom are located in France or Great Britain. Plaintiff objects to the R&R,[1] arguing that Judge Nelson misapplied the "effects" test of *Calder v. Jones*, 465 U.S. 783 (1984), and its progeny. Among other things, plaintiff argues that Judge Nelson erred in finding that Minnesota was not the "focal point" of the defendants' conduct; in finding that defendant Louis Coen was not the "aggressor" in his communications with plaintiff's father, Edward Coen; and in finding that plaintiff has failed to establish even a prima facie case that the defendants committed fraud.

The Court has reviewed the record de novo, as is required by 28 U.S.C. § 636(b)(1) and Fed. R. Civ. P. 72(b). All of plaintiff's objections have been adequately addressed in Judge Nelson's painstakingly thorough R&R. The record as a whole – rather than the record as selectively and sometimes misleadingly characterized by plaintiff – supports Judge Nelson's conclusion that plaintiff's claim that her father was defrauded is exceedingly weak and, most importantly,

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[1] Plaintiff objects to the R&R only to the extent that it recommends dismissal of the claims against defendants Louis Coen and Compayne (Hampstead) Limited. With respect to all other defendants, then, the R&R is adopted without objection.

cannot and should not be tried in Minnesota. The Court therefore overrules plaintiff's objections and adopts Judge Nelson's R&R.

ORDER

Based on the foregoing and on all of the files, records, and proceedings herein, the Court overrules Deborah R. Coen's objections [Docket Nos. 135, 136] and adopts Judge Nelson's Report and Recommendation [Docket No. 133]. Accordingly, IT IS HEREBY ORDERED THAT:

1. Defendants' Amended Motion to Dismiss [Docket No. 77] is GRANTED.

2. Plaintiff's Motion for Summary Judgment, or, in the Alternative, Motion for Evidentiary Hearing on the Issue of Personal Jurisdiction [Docket No. 102] is DENIED as MOOT; and

3. Plaintiff's Amended Complaint [Docket No. 43] is DISMISSED WITHOUT PREJUDICE.

LET JUDGMENT BE ENTERED ACCORDINGLY.

Dated: September 22, 2006

/s/ Patrick J. Schiltz
Patrick J. Schlitz
United States District Judge

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

DEBORAH R. COEN, Plaintiff, v. LOUIS COEN, DANIEL COEN, ANITA ARIELLA COEN, CAROLE M. COEN, NICHOLAS JACKSON CLARK, PETER JOHN BUNKER, COMPAYNE (HAMSTEAD) LIMITED, Trustees of the VICTOR COEN WILL TRUST, Trustees of the MIRIAM COEN WILL TRUST, Trustees of the ESTATE OF LILY COEN, JOHN DOE one, and JOHN DOE, two, Defendants.	Civil No. 05-0596 (PJS/RLE) ORDER DENYING MOTION TO SET ASIDE JUDGMENT (Filed Dec. 21, 2006)

Nathan A. Busch, BUSCH LAW FIRM, 7601 Wayzata Boulevard, Suite 207, Saint Louis Park, MN 55426, for plaintiff.

Bryan Keane, Christopher Shaheen, and Michael Skoglund, DORSEY & WHITNEY LLP, 50 South Sixth Street, Suite 1500, Minneapolis, MN 55402, for defendants.

On July 10, 2006, Magistrate Judge Susan Richard Nelson issued a lengthy Report and Recommendation

("R&R") in which she recommended that all of the claims of plaintiff Deborah R. Coen be dismissed for lack of personal jurisdiction. This Court accepted that recommendation and issued an order dismissing Coen's complaint on September 22, 2006. Judgment was entered and the case closed on the same day. On October 23, 2006, Coen filed a notice of appeal. Her appeal is now pending in the United States Court of Appeals for the Eighth Circuit.

On November 1, 2006, over a month after the case was closed, and nine days after Coen's appeal was filed, the defendants submitted a letter "clarifying" comments that had been made to Judge Nelson at oral argument on June 16, 2006. That letter has prompted Coen to move under Rule 60(b) of the Federal Rules of Civil Procedure for relief from the final judgment entered in this case. Coen alleges that the "clarification" changes the entire record on which Judge Nelson relied, and Coen requests that this Court vacate the judgment and reopen the case.

In general, "[j]urisdiction over [a] case passes from the district court to the court of appeals immediately and automatically upon a timely filing of a notice of appeal." 16A Charles Alan Wright, Arthur R. Miller, Edward H. Cooper & Patrick J. Schiltz, *Federal Practice & Procedure* § 3949.1 (3d ed. 1999 & Supp. 2005). Thus, on first glance, it may appear that this Court does not have jurisdiction to rule on Coen's motion, given that it was filed after the notice of appeal. In the Eighth Circuit, however, "case law . . . permits the district court to consider a Rule 60(b)

motion on the merits and deny it even if an appeal is already pending . . . , and a separate appeal may thereafter be taken to challenge the denial." *Hunter v. Underwood*, 362 F.3d 468, 475 (8th Cir. 2004).

Coen relies on three provisions of Rule 60(b). First, she cites Rule 60(b)(2), which authorizes a court to vacate a final judgment in light of "newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b)." Second, she cites Rule 60(b)(3), which grants a court the power to "relieve a party . . . from a final judgment . . . for . . . fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party." Finally, she cites Rule 60(b)(6), a "catchall" that authorizes a court to set aside a final judgment for "any other reason justifying relief." Relief under any of these provisions is considered "extraordinary" and is to be granted only in "exceptional circumstances." *Sellers v. Mineta*, 350 F.3d 706, 716 (8th Cir. 2003).

The one-page "clarification" submitted by the defendants does not present "exceptional circumstances" justifying relief under Rule 60(b). In his letter to the Court, the defendants' attorney, Christopher Shaheen, states:

> In recent correspondence relating to the Victor Coen Will Trust, English counsel for Deborah Coen has suggested that I was representing to the Court that Lily's 16% interest in Compayne was one of outright ownership.

> While I do not believe my remarks were that specific in nature, I want to correct any possible misimpression that could have resulted from them.
>
> I am informed that Lily Coen's 16.7% interest in Compayne was in the nature of a lifetime beneficial interest under the Victor Coen Will Trust. I believe that this is consistent with our written submissions to the Court.

Busch Decl. Ex. VIII.E.8.

This letter would not even be relevant – much less provide grounds for Rule 60(b) relief – unless it would alter the Court's previous analysis of personal jurisdiction. It would not. There is not the slightest hint in Judge Nelson's R&R that her recommendation turned on whether Lily Coen's interest in Compayne was in the nature of outright ownership or instead in the nature of a lifetime beneficial interest. Coen's attorney has simply used the November 1 letter as an excuse for submitting 45 more pages of briefs (in a case that has not suffered from under-lawyering) arguing that Coen's father was defrauded by his brother and others (a claim that this Court has already labeled "exceedingly weak").

In her supporting memorandum, Coen alleges that defendants sent the November 1 letter "to further their scheme to defraud Plaintiff of her rightful property before the Probate Court in the United Kingdom." But this is not the probate court in the United Kingdom. If Coen wants to protect that court

from being misled, she should submit papers there, not here. This Court is confident that the probate court is quite capable of considering and weighing the evidence without the assistance of this Court.

ORDER

Based on the foregoing and on all of the files, records, and proceedings herein, plaintiff Deborah R. Coen's motion for relief from the judgment pursuant to Fed. R. Civ. P. 60(b) [Docket No. 146] is DENIED.

Dated: December 21, 2006

/s/ Patrick J. Schiltz
Patrick J. Schlitz
United States District Judge

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

Dr. Deborah R. Coen, **Plaintiff,**	**Civil No. 05-596 (PJS/RLE)**
v.	**REPORT AND RECOMMENDATION**
Louis Coen, Daniel Coen, Anita Ariella Coen, Carole M. Coen, Nicholas Jackson Clark, Peter John Bunker, Compayne (Hampstead) Limited, Trustees of the Victor Coen Will Trust, Trustees of the Miriam Coen Will Trust, Trustees of the Estate of Ms. Lily Coen, John Doe One, John Doe Two, **Defendants.**	(Filed Jul. 10, 2006)

Nathan A. Busch, Esq., on behalf of Plaintiff

Christopher T. Shaheen, Esq., and Bryan C. Keane, Esq. on behalf of Defendants

SUSAN RICHARD NELSON, United States Magistrate Judge

The above-captioned matter comes before the Court on Defendants' Amended Motion to Dismiss (Doc. No. 77). This motion has been referred to the undersigned for resolution of pretrial matters pursuant to

28 U.S.C. § 636 and Local Rule 72.1. For the reasons set forth below, the undersigned recommends granting Defendants' motion and dismissing this action in its entirety without prejudice.

I. BACKGROUND

A. Procedural History

Plaintiff filed this action on March 21, 2005. (Doc. No. 1.) On July 10, 2005, Plaintiff filed her First Amended Complaint (FAC). (Doc. No. 43.) The 159-page FAC (Doc. No. 43) incorporates by reference over 1500 pages of exhibits and other materials (*see* Doc. No. 1 at 5, 43 at 8). The list of exhibits itself is over seventy-five pages in length. (FAC (Doc. No. 12) Appendix Exhibit List.) Plaintiff describes this case as "primarily a fraud case." (Pl.'s Mem. (Doc. No. 120) at 1.) The alleged fraud concerns Defendants' actions in connection with the disposition of certain shares of a family-owned foreign company, Compayne (Hampstead) Limited, which is principally located in Great Britain (FAC ¶ 8). The named Defendants sharing Plaintiff's last name are related to Plaintiff. (Busch Decl. (Doc. No. 121) Ex. VII.A.) The action also concerns the trusts and estates of deceased members of Plaintiff's family. (*Id.*) The named Defendants are all residents of Great Britain or France; Plaintiff is a citizen of Minnesota. (FAC at 2-3.) The FAC contains ten counts: (1) fraud by intentional misrepresentation; (2) fraud by negligent misrepresentation; (3) fraud by non-disclosure of material fact; (4) breach of

fiduciary duty by the trustees of the Victor Coen Trust; (5) breach of fiduciary duty by the trustees of the Miriam Coen Will Trust; (6) breach of fiduciary duty of the trustees of the Lily Coen Estate; (7) breach of fiduciary duty of the directors of Compayne; (8) mail fraud by Louis Coen; (9) wire fraud by Louis Coen; and (10) breach of fiduciary duty to Edward Coen by John Doe I and John Doe II. (FAC at 123-58.)

On August 1, 2005, Defendants filed a motion to dismiss this action for lack of personal jurisdiction. (Doc. No. 51.) On August 22, 2005, the Honorable Magistrate Judge Jonathan Lebedoff stayed all discovery in the above-captioned matter. (Doc. No. 72 at 5.) In the same order, Magistrate Judge Lebedoff carved out a limited exception to the stay for jurisdictional discovery:

> Because Defendants' challenge to personal jurisdiction is in part a factual dispute, Plaintiff is allowed to pursue limited personal jurisdictional discovery at this time. Plaintiff may serve on each Defendant a total of twenty discrete written discovery requests pertaining to personal jurisdiction. Collectively, the named Defendants may serve a total of twenty such discovery requests on Plaintiff. Without the consent of the opposing party, no general discovery may be propounded and no depositions may be taken.

(Doc. No. 72 at 5-6.) On August 31, 2005, this case was reassigned to the undersigned magistrate judge.

On October 21, 2005, Plaintiff served discovery requests on each of the named defendants. (Pl.'s November 18, 2005 letter to Court at 1). On October 24, 2005, she served a set of amended requests on three of the defendants. (*Id.*) Plaintiff served two interrogatories, three requests for production of documents, and fifteen requests for admissions on each defendant. Defendants objected to these requests and the Court held a status conference with the parties on November 23, 2005 concerning the dispute. Defendants contended that Plaintiff's requests exceed the numerical limitation imposed by Magistrate Judge Lebedoff's August 22, 2005 Order, were not limited to seeking information concerning personal jurisdiction, and improperly sought admissions regarding matters of law. (Defs.' November 22, 2005 letter to the Court at 2-3.) Plaintiff contended the objections were without basis. (Pl.'s November 18, 2005 letter to Court at 11-14.)

After a review of the matter, this Court ordered Defendants to fully respond to Plaintiff's requests for production and either (1) fully respond to Plaintiff's Requests for Admissions and Interrogatories; or (2) in lieu of responding to the Requests for Admissions and Interrogatories for any given defendant, produce that defendant for a deposition lasting up to but not longer than 3.5 hours either in person in the United States or via telephone. (Doc. No. 89.) On February 14, 2006, the Court held another status conference with the parties during which the Court directed Plaintiff to pay for the cost of translating her discovery requests

from English into French for three of the defendants. (*See* Doc. No. 91.) On February 27, 2006, Plaintiff served the translated discovery requests. (Pl.'s Mem. at 3.) Defendants served their responses on March 24, 2006. (*Id.*)

On March 31, 2006, Plaintiff moved to compel responses to some of the jurisdictional discovery described above. (Doc. No. 92.) The Court denied in part and granted in part Plaintiff's motion to compel. (Doc. No. 119.) Now that the above jurisdictional discovery stage has ended, Defendants move again to dismiss Plaintiff's action for lack of personal jurisdiction. (Doc. No. 77.) In the alternative, Defendants move to dismiss the action pursuant to the doctrine of forum non conveniens, to dismiss the action for failure to state a claim upon which relief may be granted pursuant to Federal Rule of Civil Procedure 12(b)(6), and/or "for an order striking the redundant and lengthy evidentiary narratives in Plaintiff's Amended Complaint" pursuant to Federal Rules of Civil Procedure 8, 12(e), and 12(f). (*Id.*)

Plaintiff also filed a Motion for Summary Judgment or, in the Alternative, Motion for Evidentiary Hearing on the Issue of Personal Jurisdiction (Doc. No. 102). The Court did not schedule Plaintiff's motion for oral argument but informed Plaintiff that Plaintiff could make the same arguments and cite to the same evidence merely by defending against Defendants' motion to dismiss for lack of personal jurisdiction. The Court informed the parties that it would address Plaintiff's motion if anything remained to be

decided after a ruling issued on Defendants' dismissal motion. Therefore, the Court limits its discussion below to Defendants' Amended Motion to Dismiss (Doc. No. 77).

B. Facts

Victor and Miriam Coen, citizens of Great Britain, had three children: Edward, Louis, and Lily. (FAC (Doc. No. 12) Ex. I.B. App. Part I Tab 1, 2.) Edward Coen is a citizen of Minnesota (Busch Decl. (Doc. No. 121) Ex. VII.B.) who has assigned his interest in this litigation to his daughter, Plaintiff Deborah Coen (*Id.* Ex. VII.E.). As noted above, Plaintiff is a citizen of Minnesota. (FAC at 2.) Edward also has two sons, Ethan and Joel. (FAC (Doc. No. 12) Ex. I.B. Part I.) Louis Coen, and his three children, Daniel, Anita Ariella, and Carole, are all residents of France. (FAC at 2.) The remaining named defendants are citizens of foreign lands, either France or England. (*Id.* at 2-3.)

Victor and Miriam Coen initially each held 4950 shares of Compayne and Edward and Louis each held three shares. (FAC (Doc. No. 12) Ex. I.B. Part I.) Victor Coen died in 1966. (*Id.*) At the time of Victor's death, his daughter Lily was institutionalized due to a medical condition and remained so until her death. (*Id.*) Victor Coen's Will provides in part: "I earnestly request my said sons Louis and Edward respectively (but without imposing any trust or legal obligation) that they and their personal representatives will hold

and deal with the said last mentioned equal sixth shares of my residuary estate for the benefit of my daughter Lily . . . in such manner generally and for such purposes generally as love and a wide discretion and respect for our memories shall in their judgment require." (FAC (Doc. No. 12) Ex. I.B. (Part 2) Append. Tab. 1 § 1.) Victor's will established the Victor Coen Will Trust, designed to support his daughter, Lily Coen, during her lifetime, thereafter the assets of the trust being divided equally between her brothers Edward and Louis. (*Id.*) Victor's will trust was administered by his wife Miriam Coen until her death in 1989 after which the trust's assets were managed by Trustees John Bunker, Nicholas Jackson Clark, and Louis Coen. (FAC (Doc. No. 12) Ex. I.B. Part I.) Victor's shares of Compayne were distributed in 1992 to Edward, Louis, and Lily. (*Id.*) All of the assets of the Victor Coen Will Trust are in Great Britain and the trust has never owned any assets in the United States. (*Id.*)

Before her death in 1989, Miriam Coen's shares of Compayne were transferred to Edward and Louis with the exception of ten shares that were transferred at her death to the Miriam Coen Will Trust. (*Id.*) After Miriam's death, the trustees of the Miriam Coen Will Trust transferred the ten shares of Compayne in unequal amounts to the Edward and Louis Coen families and to Lily Coen. (*Id.*) Plaintiff refers to the distribution of Victor's shares and the Miriam Coen Will Trust shares as the "1992 Transaction." (*Id.*) The "1992 Transaction" resulted in Edward Coen

and his family owning two fewer shares (4126 shares) than Louis Coen and his family (4128 shares). (*Id.*) All of the assets of the Miriam Coen Will Trust are in Great Britain, none of which have ever included United States assets, and all of which are entrusted to the trusteeship of Bunker, Clark, and Louis Coen. (*Id.*) Lily Coen died on March 14, 2002. (*Id.*) Her English estate, which includes only English assets, is administered by Louis Coen. (*Id.*) Her estate is to be divided equally between Louis and Edward. (*Id.*)

Louis Coen was a director of Compayne from 1961-1996. (FAC at 24.) Plaintiff's father, Edward Coen, a retired economics professor at the University of Minnesota, was a director of Compayne from 1962-1996. (*Id.* at 24.) Edward Coen resigned as a director in 1996. (FAC at 25.) Nicholas Jackson Clark became the sole director of Compayne in 1996. (*Id.*) Louis' son, Daniel Coen, became the Secretary of the company in 1996. (*Id.*) Until March 31, 1999, Edward owned 4126 shares[1] of Compayne, either individually or with his wife Rena; Louis and his children owned 4128 shares; and Lily owned 1655 or 1666 shares. (FAC (Doc. No. 12) Ex. I.B. Part I.)

On November 9, 1994, in a letter from Louis Coen to Edward Coen, Louis states:

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[1] Plaintiff sets forth exactly how Edward, Louis, and another shareholder, Charlie Freeman, came into possession of their shares at pages forty-six through forty-seven of her FAC. (Doc. No. 43.)

> I understood in July that you wanted to cash-in on your holding within the near future, so it is a sudden change that you want now to postpone it. I have been busy since July trying to sort out the different legal, financial and tax questions. The time I have put in to elucidate the different legal and tax matters is not lost, however, because we still need that and even more information to make possible any 'agreement' on the buy back of your shares. . . . In any case, I advise you strongly to take advice from your tax advisor, now, not later. . . . I enclose two opinions of the corporation tax solicitor that I consulted this summer that may raise some of the issues of double taxation and of company law. . . . In the mean-time I am stopping my work here on the project until I know better what you want to do.

(Busch Decl. (Doc. No. 121) Ex. VII.H at 4-5.) On November 25, 1994, Edward wrote to Louis:

> As I understand it, Compayne shares are now divided as follows: Lily, 16%; "You," 42%; "me," 42%. Excluding Lily's share, Rena and I are willing to "accept" 36% of all Compayne assets (less Lily's share), giving you 48%. That is, a 4 to 3 division in your favor. Note: I do *not* expect to claim my share until perhaps 5 to 10 years from now. . . . If it should turn out that you and I inherit Lily's share (16%), the same 4 to 3 split would be acceptable to me (unless she provides otherwise). Mr. Trask seems to be very competent. He

> should probably draft a more formal document containing the above ideas.

(*Id.* at 7-11.) In that same letter, Edward proposed that Compayne raise the funds to buy him out by selling real estate owned by Compayne. (*Id.*) On December 2, 1994, Louis wrote to Edward to inform him that he had spoken with Compayne's accountant "concerning your wish to have a written agreement set up to sell your shares. . . ." (*Id.* at 13.) On December 27, 1994, Louis wrote Edward and stated:

> As to the split of the shares I did not ask for or even expect this reduction in your percentage of the shares that you propose, and on behalf of the children we thank both you and Rena.
>
> . . . .
>
> Your proposition raises . . . several issues. . . .
>
> . . . .
>
> Another issue is how and who should make the evaluation of the property at the time you decide to liquidate your shares. This costs, I believe, a substantial amount of money unless Mr. Arnold does it. He is not, however, an "expert."

(*Id.* at 16-17.) On January 7, 1995, Edward wrote to Louis:

> Yes. We want to stick with the 36/48 sharing proportion. That makes more sense than basing anything on the relative values of the

> two buildings, since that could change over time. . . . Who should evaluate the properties at such time as a division is requested? That question has no easy answer perhaps we would be happy with any reasonably competent assessor. Does Ariella have expertise in this area? Or in choosing the person to assess property?

(Busch Decl. (Doc. No. 122) Ex. VII.H at 21.)

On March 26, 1995, Louis wrote to the English attorney, M. Trask, who was to draft the agreement concerning Edward's shares. (*Id.* at 23.) Louis indicated that the shares of Compayne were split as follows: Rena & Edward Coen, 4126 shares, Louis Coen, 4128 shares, and Lily Coen, 1666 shares. (*Id.*) Louis stated: "Ed has offered since it is he who is requesting this special arrangement, that he relinquish to Lou Coen's family 6% of his shares or the value thereof, i.e. 248 shares, and also 6% of Lily's shares, i.e. 99 shares or of the value thereof, to be passed on to him or to his family at her death." (*Id.* at 24.) Louis also stated, "I am sending a copy of this letter to Ed so that he can make any further comments to me or to you directly." (*Id.* at 26.) Also in March 1995, Edward wrote to Louis:

> Letter to Trask is fine. There is one computational error. Each family now possesses 42% of the shares:
> Me 42%; You 42%; (Lily 16%)
> Excluding Lily, our joint holdings are 84% of total shares.

My proposal is:
Me 36%; You 48% (Lily 16%)

(*Id.* at 27.) On September 7, 1995, Louis wrote to Edward:

> I have done below . . . a case study supposing that you wished to exercise your option to sell out today, assuming today's company laws, tax burdens, value of the buildings, and the company's current financial position. Some of the figures are exact, other [sic] are not. . . .
>
> Arnold's evaluation of the two properties (11/30/94) is £1,060,530 and we have approximately £200,000 in liquid assets.
>
> Distribution of shares today:
>
Ed & Rena	4126	41.6%
Lou's Family	4128	41.6%
Lily	1666	16.7%
>
> Your proposition of 11/25/94 states that you will make gifts of shares to Lou's family so that you will end up possessing approx. 36% of shares and Lou's family approx 48%. If we take into account Lily's holding, the shares would be redistributed as follows:
>
Total shares of Ed & Lou = 8254	
Ed's shares would be,	(35.7%) = 3538
Lou's shares	(47.5%) = 4716
Lily's shares	(16.8%) = 1666
Value Ed's shares	£(1,261,000/9920) x 3538 = £449,740

Value Lou's shares	£(1,261,000/9920) x 4716 = £599,483
Value Lily's shares	£(1,261,000/9920) x 1666 = £211,777

. . . .

> Our liquid assets being around £200,000 we would have to take the decision to mortgage the property to borrow £249,740. . . . An alternative solution of financing the buy-back would be to sell one of the properties, say the one in Compayne Gardens: Present day value of this property (see report Arnold) is £354,000.

(*Id.* at 31.) In October-November 1995, Louis and Edward scheduled a face-to-face meeting in New York, New York to coincide with Edward and Rena's planned trip to New York (Edward's sons apparently lived in New York at the time) to discuss Edward's sale of his shares. (*Id.* at 35-36.)

On October 30, 1995, Louis wrote to Edward, informing Edward of three options for the financing of the buy-out of Edward's shares. (*Id.* at 37.) That letter repeats the figures set forth in the September 7, 1995 proposal (supposing that Edward exercised "[on September 7, 1995 his] option to sell . . . with current company laws, tax burdens, value of the buildings, and the company's current profits and financial position etc."). (*Id.* at 37-38.) Louis stated, "Some of the figures used are approximate, and it['s] possible that I ignore some tax and legal problems. However they are sufficient to demonstrate the issues

involved." (*Id.* at 37.) Louis proposed three "options" to finance Edward's buy-out: (1) mortgage the Compayne Gardens property; (2) sell the Compayne Gardens property; or (3) have Edward sell off only a number of shares equivalent to the corporation tax each year to avoid Compayne having to pay the advanced corporation tax. (*Id.* at 38-39.)

In early December 1995, Louis, Edward, Rena, Joel, Ethan, and Daniel met in New York City. (Defs.' Mem. at 7.) Daniel Coen has filed an affidavit in which he states that he did not communicate with Edward concerning the terms of the sale of Edward's shares. (Keane Decl. (Doc. No. 101) Ex. F.)

On December 21, 1995, Edward wrote to Louis:

> I think your trip to New York was very useful. . . . on further thought, I am not as confident that we can count on a substantial increase in [Compayne Gardens] value in the short term. One reason is that the market can go down as well as up. . . . I now feel strongly that we should proceed promptly to clear the decks of this issue. . . . I should certainly have brought this up at the time of our meeting in New York. I do not know for sure, why I did not. There could be three reasons. First, I have a memory that sometimes functions well, and sometimes doesn't function at all. Second, my thought processes are so slow. And third, I am always persuaded by the person currently talking to me. . . . [W]hat the Company pays us for all of our shares should reflect the 36%-48% formula,

> and it should also reflect a further deduction of any capital gains tax on the proceeds from selling Compayne Gardens and securities. It may be relevant that we own only a minority of the shares for which there is no market, so that the value of our shares is *legally* what you are willing to pay for them. Therefore, after subtracting the capital gains tax on the sale of Compayne Gardens and securities, the resulting outlay to buy our shares may be less than 449,740 pounds. I am not sure that the foregoing calculations are correct and I imagine that there are other complications, but I would like to move toward an agreed document quite soon. I hope that this is agreeable to you. I believe that everyone can come out ahead if we can resolve this business.

(Busch Decl. (Doc. No. 123) Ex. VII.H at 40-41.) In a letter dated January 18, 1996, Louis responded to Edward:

> I was speechless by your letter announcing the sudden turn-around on what we all agreed to in N.Y. one month ago that I had to take my time to think it all out. . . . I have written below what we had decided in NY. It is essential that you take the time and effort to review [the summary of the conclusions of the N.Y. meeting] thoroughly. . . .
>
> 1. We foresaw that property values would probably rise in the future in Hampstead. Assuming these are correct assumptions no

one has an advantage in rushing into a sale of property. . . .

. . . .

4. We need three years to capitalize on the substantial improvements and investments we have made over the last 10 years and which will permit us to minimize the expenses and thus increase the profitability, of the company during these 3-years before we sell out. The better the last three annual financial statements are, the better the selling price.

There is no way, therefore, except at the expense of all the shareholders, to sell shares in less than three years. . . .

. . . . In going through my files on the company shares last week I fell upon the papers concerning Dad's will. He wanted that 50% of his estate was to be put aside in case of a need by Lily. He deliberately left legally less to Lily so that the money would not be tied up unnecessarily and incure added inheritance tax. Yet we have been busy during the last 1 ½ years trying to dispose of her money. All of us, you and I, have a heavy responsibility in having forgotten the terms of Victor's will despite that we all made a written commitment to follow his wishes.

In my opinion this forecloses the idea of you or us now selling out more than about ½ of our shares. Lily has already 1/16 of the total. . . .

When and who will decide to take her share of her money out of the company?

In order to figure out where we can go from here, it would be helpful to go back to the starting point 18 months ago when you made your first request to cash in your shares.

. . . .

In July '94 you indicated that you wanted to cash in on your holding in the near future. . . . Five months later in October, before I had finished the study, you changed your mind and you no longer needed the money now but would like to have an option to sell in 5-10 years. . . . After a great deal of work and expenditures . . . this turned out to be impractical, and you then returned to your original request to sell-out of your holdings as soon as reasonably possible. . . . This proved impractical also, and you agreed in N.Y. to the 3 year plan. A month later you reneg [sic] on that plan and announce that you want to sell your shares now ignoring the difficulties and the prejudice for the other shareholders pointed out in NY.

. . . .

As soon as we reach a meeting of minds we can then start immediately to work on the next steps to prepare the way for you, if that's what you still wish, to cash in on as many shares as possible without infringing on Lily's interests.

(*Id.* at 42-44.) Edward responded to Louis in a letter dated January 25, 1996:

> I have been thinking some more about Option 2, and enhancing the numbers in the direction that might make it more attractive from your point of view.
>
> The essence of the proposal is this. I am willing to take a further deduction in our share, from 36% to 33%. Furthermore, I am willing to see that 33% of the "asset" value further reduced by the amount of nearly all the tax and other costs incurred by the Company incidental to purchase of the shares. . . . The amount left after these deductions is approximately 300,000. This would be the price of record received by us for all our shares. . . .
>
> . . . .
>
> After we received the 300,000 we are willing to segregate 100,000 in a special trust for Lily's use if she should need funds during her lifetime.
>
> If my memory is correct, I believe you told me some time ago that you believed that it was Victor's intent that she should have a one third share in the Company. But I am not sure if that recollection is correct.
>
> If you feel that this proposal is unfair to your family, I will naturally be willing to consider whatever suggestions you may make. But I do want to clear the decks of this

> issue as soon as it reasonably can be accomplished.

(*Id.* at 45, 47.) In a letter dated, January 31, 1996, Edward wrote to Louis:

> I have mailed to Joel all of the relevant material in my file, going back at least two or three years, and in a few instances earlier. I think it is pretty complete. I am perfectly content to let you and Joel work out a consensus that is acceptable to all parties. All I want is an agreement that is fair for everyone.

(*Id.* at 48.)

Edward wrote to his two sons on February 1, 1996:

> This is a follow up . . . of the material in my letter to Louis dated Jan. 25, 1996. It provides Louis with a significant delay in the buyout of our shares. It allows for the three year delay that he desires for adapting to IRS rules. In addition it may offer him a significant delay beyond that. It also suggests what may be a feasible and fair arrangement for safeguarding Lily's moral claim on 50% of the Company's assets to the extent that she may need it.
>
> (1) The buyout of our Shares:
>
> To take care of the IRS problem, we would commit to not ask for a buyout before Jan. 1, 2000. That is a delay of nearly four years. . . . After that date we wiould (sic) refrain from asking for a buyout until we perceived a need

> for the money. . . . Once our need is declared. . . . we would claim only 33%, instead of 42%, of the "asset" value of the totality of all shares, *minus* the tax and other costs. . . . at this point they are only proposals for discussion.

(FAC (Doc. No. 13) Ex. I.D. at 104-05.) On February 2, 1996, Edward again wrote to his sons. Edward wrote, "This is a follow up and revision of my letter dated . . . Feb. 1. . . ." He first summarized his February 1, 1996 proposal in a chart form:

> Basic data:
> Legal Allocation of Shares:
> Louis 42% Us 42% Lily 16%
>
> Moral Allocation: Victor's wishes if Lily needs it:
> Louis 25% Us 25% Lily 50%
>
> My proposal as of Feb 1
> Louis 48% Us 33%

(*Id.* at 106.) Edward then continued:

> My Revised Proposal as of Feb. 2, 1996:
>
> At any time after Jan 1, 2000, when we feel a need for it, we are accorded the right to:
>
> (1) a single transaction buyout of only 25% of the totality of shares in order to leave the Company in possession of Lily's potential moral claim on 50% of the shares (This may agree with Louis' remarks on this subject in his letter of October 30, 1995)

> (2) We would not seek any further buyout of our shares until Lily's death. At any time after that we have the right to a buyout of another 8% of the totality of all shares (bringing us to the 33% level that I have already committed to accept) PLUS the value of any share bequeathed to us in Lily's will.
>
> (3) If Lily does receive any money from the Company (beyond dividends on the 16% of the totality off (sic) shares that she legally owns), then one half of that amount would be subtracted from what is due to us under paragraph (2) immediately above. . . .
>
> I apologize for burdening you with all this. But it is clear that Louis and I do not seem to be able to stay on the same wave length in these negotiations, and it would be better for our relationship if I bowed out.

(*Id.* at 106-07.) Louis wrote to Edward on February 7, 1996:

> I received your letter of January 25th after your telephone call. . . . Your offer to reduce the value of your shares is very generous. It make (sic) the financing that much easier. By that time maybe we will be able to find a way to engineer a reduction of the expenses and taxes.
>
> Please inform me if the delay of buying-out your shares creates a financial problem for you. In that case I can look for a way of advancing you money.

> In regards to Lily's interests Dad expressed the wish that 50% be reserved for her. I would think, however, that in three years, if her situation has not changed, one third would be sufficient to cover any eventuality. What is your opinion?

(Busch Decl. (Doc. No. 123) Ex. VII.H at 49.) In a letter dated February 9, 1996, Edward wrote to Louis:

> This is a follow up on my letter dated Feb 7th or 8th. I want to get back to the personal relationship that existed between us before these negotiations seemed to go sour. At that time you trusted me, and I trusted you.
>
> Joel will be making proposals toward that end. If we both share that goal, it is inconceivable to me that we cannot succeed.

(*Id.* at 52.)

Edward apparently met with Joel and Ethan in New York in February 1996. (*See id.* at 51.) In a document dated February 12, 1996 and titled, "Items for discussion in New York," Edward wrote (apparently to his sons):

> I have been thinking about the contents of Louis' long and angry letter of Jan. 18. A few things finally penetrated my mind. First, I had never really appreciated the magnitude of the effort that he has devoted over the last twenty five years to converting Netherhall Gardens (one of the houses containing 8

apartments) from a zero profit rent controlled enterprise into a high profit operation.

This has required a lot of work. . . .

. . . .

These tasks are not things that in England could at that time have . . . been delegated to managing agents. Their charges were high and their level of effort was minimal.

Moreover, during the last ten years of Miriam's life he had to manage all her financial affairs. . . .

And for the last fifteen years he has in effect, had to serve as a parent for Lily, who was until about a year ago, subject to a variety of crises, including hunger strikes. . . .

All this time I sort of took all these chores for granted. Since I was too far away to help, it did not really occur to me that he was carrying an unusual burden. This means that, with respect to the properties, he created the increase in their value, and I was just a detached shareholder. My number might be 42% of the shares, but my contribution to their value was zero.

. . . .

The implications of all of this are:

(1) My 42% of the shares grossly overstates my entitlement, I have contributed zero to

their value, and have not contributed significantly to the tasks of helping my mother . . . or Lily.

. . . .

For these reasons, and to restore my original good relationship with Louis, I suggest that:

(1) I limit my claim to 25% of the gross asset value of the Company minus the reasonable tax and other costs of converting that gross 25% into the net amount of cash payable to me for my shares.

(2) My rough guess is that, as of now, the gross 25% is about 300,000 pounds, and that the net amount would be about 225,000 pounds (close to 350,000 dollars)

(3) If I limit myself to this amount, they will four to five years from now, be able to buy me out with their reserves in cash and securities, (or with these reserves and by borrowing a relatively modest sum secured by a mortgage). . . .

. . . .

So we have a situation where they can both buy me out and still retain ownership of both properties. . . . If I limit myself to 25%, they become responsible for all expenses for Lily implicit in Victor's request. In other words, this will be an issue that does not have to be negotiated between us. . . .

. . . .

> (6) If dividends are paid to us in the interim, that should count toward the total that we will have a claim to, since I can invest them advantageously, and they will grow in value at a reasonable rate, even if it is a little less than what might accrue if left with the Company.

(Busch Decl. (Doc. No. 124) Ex. VII.I.1 at 6-10.) On February 22, 1996, Edward's sons sent Edward's proposal to Louis by facsimile. (Busch Decl. (Doc. No. 123) Ex. VII.H at 53-56.) In their cover page, they note:

> It was striking talking to Ed how close his main concern was to yours – he was very upset that the two of you had quarrelled and therefore anxious to resolve this on *any* terms simply to put the quarrel behind him.
>
> Ed is also very mindful not only of what you've done to create the value of the property, but over the years in managing Miriam's, Lily's, Florence's affairs. He wondered whether his gift of shares to you was sufficient (not a gift really but a compensation for all of the above).

(*Id.* at 53.) The attached proposal states in part under the heading, "In General," that:

> The risks and rewards implicit in this arrangement seem to balance. Lou risks that the value of the company will decrease between now and the time of purchase, which he commits to making for a fixed amount.

> This is balanced by E forfeiture to Lou of the difference in value if it should increase.

(*Id.* at 55.)

On March 17, 1996, Louis wrote to Edward and Edward's sons:

> This letter confirms the verbal agreement I gave you over the phone as to the terms of the Fax of February 22nd, but here are several minor points to be clarified.
>
> Note that it is . . . "Compayne Ltd.," which will be buying back the shares, not our family as mentioned in your Fax. Another detail, Ed's 4126 shares is exactly 41.6% of total shares. In the instructions I gave to Mr. Ericsson I assumed that the percentage retained as Ed's continuing interest in the company would be 7.6% instead of 8%. Is this O.K.?
>
> . . . .
>
> . . . . Your Fax stated that Ed will sell 2480 shares (25%) for £280,000 (£300,000 minus, approximately, the dividends distributed up to that date. . . .
>
> You raised two points in your Fax, date of buy-out and current value. We suggest that the transaction takes place in January or February, 1999. Is this O.K.? As to the current value, you proposed £300,000 in your Fax. Do you still agree to this?

> Our agent, Mr. Arnold, gave a professional estimate (we paid him a substantial fee for his work) of the property value based on current values of similar apartments in the same area. (Ed has a copy) which he documented fully. We can ask for other evaluations each one of which I assume would be different, some more, others less. The only way to have a relatively firm figure would be to put up . . . the property for sale and go through with a 'bad-faith' negotiation process with potential 'buyers'. As you say in your Fax the risks are spread more or less evenly over the two parties. You should clarify your position on this point.

(*Id.* at 59-60.) On May 9, 1996, Louis wrote to Ed:

> You want to modify the proposition you made to us on February 22nd in order to reduce your capital gains taxes. You propose that the gift of 9% of the shares that you offered to our family in recognition of the results we have obtained with Compayne, be included in the buy-back instead of being directly transferred as a gift to our children. You would sell 34%, 3373 shares, instead of 25%, 2480 shares, for the same amount, £300,000 minus the dividends distributed to you up to that date, i.e. approximately £280,000.
>
> . . . .
>
> This appears surprising. Let me explain. Shares bought back by a company are dissolved. This means that the current number of total shares, 9920, in the company will be

> reduced by the number of shares the company buys back from you. In your new proposition to sell back 3373 instead of [illegible]0 shares, the gift packet of 9%, 893 shares, is distributed among all the shareholders instead of only to our children as per your February proposition. The impact on the value of these holdings is magnified because the total number of shares being reduced, the value of each share is increased, all other things being equal.

(*Id.* at 61.) On May 23, 1996, Edward's son, Ethan, replied:

> I was unaware until recently of Ed's capital gains concerns, and so never passed them on to you, and I was totally ignorant until your last letter of the fact that the company erased the shares it bought back, with all the consequences flowing from that.
>
> . . . .
>
> As you know, Ed's only concern is security – that he be able to count upon a certain amount of money by a certain date.
>
> . . . .
>
> [Ed proposes that he retain no shares. That is, for the agreed upon sale price, the company shall be buying back all of Ed's shares. This then will give Ed his expected buy-out price and his desired tax consequences, and will prevent him only from enjoying a later advantage that he never sought anyway.]

(*Id.* at 64-65.)[2] On July 3, 1996, Louis wrote to Ed:

> You say that you are perfectly co[m]fortable with the terms of Ethan's letter of May 23rd despite the fact that our kids feel it is over generous. . . . We assume, therefore, that the terms in the letter from Joel and Ethan of May 23rd are final, and that we can now invest, more profitably, the cash we have in the bank so that . . . in January 1999 we will be in a better position to buy out all of your shares for £300,000 minus the interests paid out to you up to that date.

---

[2] According to Plaintiff, the above bracketed text appears in the signed May 23, 1996 letter provided by Louis Coen through discovery but different text appears in the version of the May 23, 1996 letter maintained by Plaintiff. Plaintiff's unsigned version has handwritten marks on it, which read: "Mailed to Louis pretty much as is, and with minor revisions" and the text "Joel and Ethan's draft." (FAC (Doc. No. 13) Ex. I.D. at 174.) In place of the bracketed text, Plaintiff's unsigned version reads:

> Therefore, let me suggest the following. If you do upon reflection feel that there is inequity in Ed's request considering the deal overall, you compensate yourself from Ed's remaining 7.6% of the shares. That is, for the agreed-upon sale price, you shall receive from Ed not 34% of the shares, but whatever portion between 34% up to an[d] including 42%, that you deem appropriate.

For purposes of Defendants' motion to dismiss, the Court adopts Plaintiff's version as the one either received by Louis Coen and/or believed to have been received by Louis Coen by Edward Coen. The Plaintiff's version, however, does not alter the Court's ultimate determination on Defendants' motion.

(*Id.* at 66-67.) Edward and Rena wrote back to Louis on July 15, 1996:

> Let's just stay with Ethan's letter and forget about any gifts. That keeps things clean and simple and is totally O.K. with me. So you can invest on that assumption. I am getting advice here on the tax issues. But whatever that turns out to be, the deal is still firm.

(*Id.* at 68.) On June 11, 1998, Compayne's accounting firm sent Edward a letter indicating that, less dividends paid, Edward would receive £292,088 in exchange for all of his shares of stock in Compayne. (*Id.* at 69.) On March 31, 1999, Edward and Compayne executed an agreement for the purchase of all of Edward's 4126 shares for £285,843.61. (Busch Decl. (Doc. No. 12) Ex. I.B. at App. Tab 4 § 2.) Plaintiff refers to this sale as "The 1999 Transaction." (FAC (Doc. No. 12) Ex. I.B. Part I.)

C. Plaintiff's Jurisdictional Allegations

As noted above, Plaintiff filed this action on March 21, 2005 and the operative FAC on July 10, 2005. (Doc. Nos. 1, 43.) Plaintiff's FAC contains the following subject matter and personal jurisdiction allegations:

> 1. This Court has jurisdiction over this action pursuant to 28 U.S.C. § 1332(a), because of diversity of citizenship and 28 U.S.C. § 1332(b) as each of the Defendants, save for Defendants John Doe One and John Doe Two

> who are residents of a State other than the State of Minnesota, is a resident of a foreign state. Further, this Court has jurisdiction over this action pursuant to 28 U.S.C. § 1331, because of the existence of several federal questions raised in this Complaint. The Court also has jurisdiction over this action pursuant to 18 U.S.C. § 1341, because of Mail Fraud, and 18 U.S.C. § 1343, because of Wire Fraud. This Court has pendant jurisdiction over the claims arising under state law pursuant to 28 U.S.C. 1338(b). The amount in question herein exceeds $75,000.00.
>
> 2. This Court has personal jurisdiction over each of the Defendants.

(FAC at 4-5.)

Specifically, Plaintiff claims that jurisdiction is proper over Louis Coen, Daniel Coen, Anita Ariella Coen, Carole M. Coen, Nicholas Clark, Peter Bunker, Compayne, the Trustees of the Victor Coen Will Trust, Miriam Coen Will Trust, and Lily Coen Estate because they have allegedly:

> (1) conducted a business transaction, comprised of The 1992 Transaction or The 1999 Transaction, either directly or through an agent from outside of the State causing injury to property within the State; (2) caused injury to personal property within the State; (3) deceived Mr. Edward Coen, either directly or through an agent, within the State causing injury to a citizen and resident of the State of Minnesota; and (4) appeared, by

> Local Counsel, before a Court of the State of Minnesota in a matter related to and part of the present action.

(*Id.* at 5-7.)

Plaintiff further alleges that jurisdiction is proper over Louis, Daniel, and Carole Coen because they allegedly "traveled to and within the State of Minnesota." (*Id.* at 5-6.)[3] Finally, Plaintiff alleges in a chart exhibit that personal jurisdiction is proper over certain defendants on certain claims based on what she refers to as the *Aftanase* test, which, while not cited in her response brief, presumably refers to *Aftanase v. Economy Baler Co.*, 343 F.2d 187, 197 (8th Cir. 1965), a case in which the Court of Appeals for the Eighth Circuit adopted a five part test for determining whether in personam jurisdiction exists. (Busch Decl. (Doc. No. 127) Ex. VII.P.3.) In her chart, Plaintiff also states that, given the chance, she would amend her FAC to allege some of her existing claims against named Defendants not currently identified with those claims. (*Id.*)

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[3] At oral argument, Plaintiff's counsel, Nathan A. Busch, argued that Daniel and Carole traveled to Minnesota to attend the May 19, 1996 wedding of Busch and Plaintiff. Defendants have previously represented to the Court (in a different action) that Louis Coen has resided in France since shortly after World War II but has traveled to Minnesota most recently in July 1999 to attend Edward and Rena's fiftieth-wedding anniversary, in September 2001 to visit Rena in the hospital, and in October 2001 to attend Rena's funeral. (FAC (Doc. No. 45) Ex. III.A.)

II. PARTIES' POSITIONS

Plaintiff's response brief argues that personal jurisdiction is proper over Defendants because the effects of the fraud by intentional misrepresentation which she levels at all of the named Defendants except the trustees of the Victor and Miriam Coen Trusts (Doc. No. 127 Pl.'s Ex. VII.O.1) were felt in Minnesota. (Pl.'s Response at 7-16.) Plaintiff contends that jurisdiction exists over Defendants under what is known as the "effects" test, a test for determining whether personal jurisdiction exists in cases where the defendants are accused of committing intentional torts as first described in *Calder v. Jones,* 465 U.S. 783 (1984). (Pl.'s Response at 7.)

> In *Calder,* Shirley Jones sued Calder and others in California for libel stemming from an article appearing in the tabloid National Enquirer. Calder, president and editor of the Enquirer, was a Florida resident and had only been to California [where the Enquirer had a substantial percentage of its national circulation] twice, both times on unrelated matters. The *Calder* Court, approving of the effects test used by the lower court, held that personal jurisdiction in California existed even though the article had been written and edited in Florida and Calder's visits to California were unrelated to the suit. However, it was more than mere effects that supported the Court's holding. The Court found that Calder intentionally aimed his tortious action at California and could, therefore, have

> "reasonably anticipate[d] being haled into court there."

Hicklin Eng'g, Inc. v. Aidco, Inc., 959 F.2d 738, 739 (8th Cir. 1992) (per curiam) (quoting *Calder*, 465 U.S. at 790).

Plaintiff contends that Defendants intentionally misrepresented three material facts to get Plaintiff's father, Edward Coen, to sell all of his Compayne shares for far less than their actual worth. Those facts concern:

> (1) the fraction of the "asset value" of Compayne to which Lily [Coen, Plaintiff's aunt] was entitled;
>
> (2) the "asset value" of Compayne; and
>
> (3) the fraction of the "asset value" of Compayne . . . Edward [Coen] could have access[ed].

(Pl.'s Response at 7.) Plaintiff claims that these three factors were the key reasons Edward Coen made the decision to sell his shares for around £300,000. (*Id.*) Because the first and third claimed misrepresentations concern Lily Coen's interest in Compayne under the Victor Coen Will, the arguments concerning each are considered together.

A. Lily Coen's Interest in Compayne Under the Victor Coen Will

First, Plaintiff argues that before December 21, 1995, "Edward evidently believed that Lily was

entitled to a fraction of the 'asset value' of Compayne equal to her percentum shareholding in Compayne, which was about 16.7%." (Pl.'s Response at 11.) Plaintiff claims that Louis Coen intentionally misrepresented in his January 18, 1996 letter that Lily Coen was "'entitled'" to call upon 50% of Compayne" at a time when Plaintiff claims Louis Coen knew that Lily Coen was not entitled to any of the asset value of Compayne under the terms of the Victor Coen Will. (*Id.*) Plaintiff argues that Louis Coen's misrepresentations about Lily's interest in Compayne stemming from the Victor Coen Will led Edward to believe that he could not sell more than half of his 4126 shares. (*Id.* at 16.) Plaintiff further argues that when Louis Coen stated in his February 7, 1996 letter to Edward, "In regards to Lily's interests Dad expressed the wish that 50% be reserved for her," Louis was under an affirmative duty to qualify this statement by indicating that the stated fraction was 50% of the estate of Victor Coen and not 50% of Compayne. (*Id.*) Plaintiff contends that the "record demonstrates that Louis and Compayne, as well as Daniel, had uninhibited access to the documents relevant to" the intentional misrepresentations of Lily's interest and the resulting fraction of "asset value" accessible by Edward. (*Id.* 16-17.)

Defendants respond that Edward repeatedly described Lily's interest in the Compayne shares as a "moral claim." Defendants cite to Edward's February 1, 1996 letter to his sons in which Edward writes that his 33% buyout proposal, "suggests what may be a

feasible and fair arrangement for safeguarding Lily's moral claim on 50% of the Company's assets to the extent that she may need it." (Defs.' Reply at 7 (citing Doc. No. 13 at 101.)) Defendants also cite Edward's revised proposal of February 2, 1996 in which Edward proposes he receive payment for only 25% of the total shares of Compayne "in order to leave the Company in possession of Lily's potential moral claim on 50% of the shares (This may agree with Louis' remarks on this subject in his letter dated October 30, 1995)." (*Id.* (citing Doc. No. 13 at 106.)) Defendants argue:

> The parties discussed a variety of ways of meeting what they viewed as a joint moral obligation, including the possibility of Edward retaining some percentage of shares subject to potential contribution to Lily in the event it was needed. In the end, Edward proposed that he sell all of his 4126 shares at a price named by him and this became the agreement. Edward's interest in Compayne was not diminished in any way by a "legal" or "moral" entitlement on Lily's part.

(*Id.*) At oral argument, Defendants also argued that by agreeing to only 25% of the value of Compayne in exchange for all of his shares, Edward had written on February 12, 1996 that Louis' family would "become responsible for all expenses for Lily implicit in Victor [Coen's] request. In other words, this will be an issue that does not have to be negotiated between us. . . ." (citing to Doc. No. 124 at 8.)

B. "Asset Value" of Compayne

Plaintiff also argues that Louis Coen committed intentional fraud by representing to Edward that the "asset value" of Compayne on March 17 and May 9, 1996 was £1,200,000. (Pl.'s Response at 15.) Plaintiff argues that Louis represented in his March 17, 1996 letter that "Our agent, Mr. Arnold, gave a professional estimate (we paid him a substantial fee for his work) of the property value based on current values of similar apartments in the same area (Ed has a copy) which he documented fully." (*Id.* (citing Doc. No. 123 at 60.)) Plaintiff also cites Louis' letter to Edward on May 9, 1996 in which Louis wrote, "We have estimated that the company's worth in three years time will be approximately £1,100,000 taking into account the outgoings – dividends, buy-back costs, and taxes, and the net income. . . . To make a true comparison we have to assume, that the properties have the same real estate value as today." (Doc. No. 123 at 63.) Plaintiff contends that the true "asset value" of Compayne's real estate holding on March 11, 1996 "was approximately £2,575,000." (Pl.'s Response at 14.) Plaintiff cites to a November 2004 valuation study of Compayne's real estate holdings commissioned by Plaintiff in which the evaluator proffered an opinion on the value of those holdings as of March 11, 1996. (*Id.*) Plaintiff contends that the "record demonstrates that Louis and Compayne, as well as Daniel, had uninhibited access to the documents relevant to" the true "asset value" of Compayne. (*Id.* at 16-17.)

Defendants respond that "[a]t the end of 1994," when Edward Coen was still a director of Compayne, "Louis Coen provided Edward Coen with an estimated current value of Compayne's two buildings, which was prepared by Martin Arnold & Co. Ltd. 'for internal accounting purposes for your company and its shareholders only.'" (Defs.' Reply at 4 (citation omitted.)) According to Defendants, "Louis Coen discussed the limitations of the appraisal and noted that Edward might want to obtain his own evaluation: 'Another issue is how and who should make the evaluation of the property at the time you decide to liquidate your shares. This costs[,] I believe, a substantial amount of money unless Mr. Arnold does it. [He] is not, however, an 'expert.'" (*Id.* (citing Louis' December 27, 1994 letter to Edward.)) Defendants further argue that Louis wrote to Edward on January 18, 1996 summarizing the conclusions he thought both Louis and Edward had agreed on at the New York meeting: "We foresaw that the property values would probably rise in the future in Hampstead. . . . Assuming these are correct assumptions no one has an advantage in rushing into a sale of property." (*Id.* (citing Doc. No. 123 at 42.)) Defendants contend that it was Edward who after "'further thought' . . . rejected Louis' bullish opinion, stating, 'I am not as confident that we can count on a substantial increase in its value in the short term. One reason is that the market can go down as well as up.'" (*Id.* at 4-5 (citing Edward's December 21, 1995 letter to Louis.)) Defendants contend that the correspondence between Edward (and his sons) and Louis demonstrates that

Louis wanted to postpone Edward's buy-out but that Edward and his sons "remained insistent upon selling . . . and . . . proposed to fix the price of the transaction in 1996 at £300,000 (with the actual purchase occurring three years later.)" (*Id.* at 5.) Defendants contend each side bore risks in setting the price so far in advance of the sale as is demonstrated by the February 22, 1995 facsimile Edward's sons sent to Louis in which they wrote:

> The risks and rewards implicit in this arrangement seem to balance. Lou risks that the value of the company will decrease between now and the time of purchase, which he commits to making for a fixed amount. This is balanced by Ed's forfeiture to Lou of the difference if it should increase.

(*Id.* (citing the February 22, 1995 letter.)) Defendants also argue that Louis suggested to Edward on March 17, 1996 that other evaluations could be requested but that on May 23, 1996, Edward's son Ethan Coen wrote to Louis that "Edward proposes that he retain no shares. That is, for the agreed-upon sale price, the company shall be buying back all of Ed's shares."[4] (*Id.* at 6.) Defendants argue that the "correspondence reveals the antithesis of fraud: Louis Coen expressing the opinion that the value of the properties was likely to increase and urging Edward not to sell." (*Id.*) Additionally, Defendants argue:

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[4] Plaintiff disputes this is what Edward believed was in the text of the May 23, 1996 letter. *See supra* note 1.

> The correspondence also makes evident that there were numerous non-monetary factors considered by both Louis and Edward in connection with the transaction. Edward's desire for security, liquidity and favorable tax consequences were important factors. Perhaps the "main concern" of both brothers throughout, however, was a strong desire not to tear asunder the bonds of brotherly affection between them.

(*Id.*)

Defendants further contend that, "[e]ven if Plaintiff could establish a 'prima facie' claim" of intentional fraud, "the focal point" of the fraud for purposes of the *Calder* "effects" test was not Minnesota because Louis Coen did not purposefully direct any activity toward Minnesota but, instead, was responding to a shareholder's request to cash out his Compayne shares. (*Id.* at 7-8.) Defendants contend that personal jurisdiction over any of the other Defendants is derivative of Louis' actions or based on actions taken merely as a result of their status as shareholders of Compayne. (*Id.* at 8-9.)

At the hearing on the motion, Plaintiff argued that it is irrelevant to the application of the *Calder* "effects" test who initiated contact or who was the primary aggressor. Plaintiff further claimed that it is undisputed that the final proposal for the conveyance of Edward's 4126 shares was drafted on the computer owned by Edward Coen on May 23, 1996 and that this action imbues this Court with specific jurisdiction

over at least some of the Defendants. Plaintiff also argued that the Court must apply the Due Process analysis of the Fifth, and not the Fourteenth, Amendment because its claims are in federal court because of federal question jurisdiction. Plaintiff contends that the relevant geographical extent of the forum under the Fifth Amendment personal jurisdiction analysis is the entire United States and it is uncontroverted that Defendants Mr. Louis Coen, Mr. Daniel Coen, and Compayne . . . met with Mr. Edward Coen, Mr. Joel Coen, and Mr. Ethan Coen in New York in early December, 1995, to discuss the conveyance of the 4126 shares from Mr. Edward Coen. Therefore, according to Plaintiff, Louis, Daniel, and Compayne, were physically present in the forum for purposes of the Due Process analysis. Finally, at the motion hearing, Plaintiff argued that the brunt of the injury alleged was sustained in Minnesota because Edward was in Minnesota when he conveyed his shares of Compayne for far less than their actual worth.

III. DISCUSSION

A. Standard of Review

"To survive a motion to dismiss for lack of personal jurisdiction, a plaintiff 'must state sufficient facts in the complaint to support a reasonable inference that [the defendants] can be subjected to jurisdiction within the state. Once jurisdiction ha[s] been controverted or denied, [the plaintiff] ha[s] the burden of proving

such facts.'" *Dever v. Hentzen Coatings, Inc.*, 380 F.3d 1070, 1072 (8th Cir. 2004) (quoting *Block Indus. v. DHJ Indus., Inc.*, 495 F.2d 256, 259 (8th Cir. 1974) (internal citation omitted), *cert. denied*, 543 U.S. 1147 (2005). "When considering whether personal jurisdiction exists, the court may consider matters outside the pleadings. *Stevens v. Redwing*, 146 F.3d 538, 546 (8th Cir. 1998) (citing *Land v. Dollar*, 330 U.S. 731, 735 n. 4 (1947) (noting that "when a question of the District Court's jurisdiction is raised . . . the court may inquire by affidavits or otherwise, into the facts as they exist" and "the mode of its determination is left to the trial court")).[5] In fact, where, as here, a defendant challenges personal jurisdiction with affidavits or documents:

> The plaintiff's "'prima facie showing' must be tested, not by the pleadings alone, but by the affidavits and exhibits presented with the motions and in opposition thereto." *Id.* at 260; *see also Davis v. St. John's Health Sys.*,

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[5] "While in some cases it is more appropriate to test jurisdictional facts upon the proof adduced after full discovery, the court may properly address itself to the jurisdictional issue at any earlier stage of the proceedings where the affidavits and other exhibits presented on motion and opposition thereto make the issue ripe for early determination." *Block Industries v. DHJ Industries, Inc.*, 495 F.2d 256, 259 n.3 (8th Cir. 1974) (citations omitted). Here, the Court has provided sufficient discovery opportunities for Plaintiff to have uncovered prima facie evidence of personal jurisdiction over Defendants. This is especially true in light of the tome-like FAC and its reams of incorporated exhibits.

> *Inc.*, 348 Ark. 17, 71 S.W.3d 55, 57 (2002) ("If the complaint does not allege sufficient facts on which personal jurisdiction can rest, then the complaint is factually deficient. Mere conclusory statements devoid of a factual foundation do not suffice in this inquiry.") (internal citation omitted); *Jet Charter Serv., Inc. v. W. Koeck*, 907 F.2d 1110, 1112 (11th Cir. 1990) ("When a defendant raises through affidavits, documents or testimony a meritorious challenge to personal jurisdiction, the burden shifts to the plaintiff to prove jurisdiction by affidavits, testimony or documents."); *Taylor v. Portland Paramount Corp.*, 383 F.2d 634, 639 (9th Cir. 1967) ("We do not think that the mere allegations of the complaint, when contradicted by affidavits, are enough to confer personal jurisdiction of a nonresident defendant. In such a case, facts, not mere allegations, must be the touchstone.")

Id. at 1072-1073. In this context, a plaintiff has presented a "prima facie case" of jurisdiction over the defendant "if there is any genuine issue as to any fact material to the jurisdictional question." *Radaszewski v. Telecom Corp.*, 981 F.2d 305, 309 (8th Cir. 1992), *cert denied*, 508 U.S. 908 (1993).

As the Eighth Circuit has stated:

> This is the same standard as the one we apply on motions for summary judgment under Rule 56. We look at the facts in the light most favorable to the party opposing the motion, give him the benefit of all reasonable

> inferences, and grant the motion only if there is no genuine issue as to any material fact, so that the moving party is entitled to judgment as a matter of law. So here, though the motion is captioned under Rule 12(b)(2) rather than under Rule 56, the analytical process is the same as that used on a motion for summary judgment. We look at the facts relevant to the issue of jurisdiction in the light most favorable to [the plaintiff], give him the benefit of all reasonable inferences from these facts, and deny the motion to dismiss if the record, viewed in this way, raises any genuine issue of fact material to the issue of jurisdiction.

Id. at 310.

B. Due Process and Personal Jurisdiction

This Court has personal jurisdiction over a foreign defendant if a state court in Minnesota would also have jurisdiction. *See Digi-Tel Holdings, Inc. v. Proteq Telecomm. (PTE), Ltd.*, 89 F.3d 519, 522 (8th Cir. 1996). Minnesota's reach over foreign defendants extends to the fullest extent permitted by the United States Constitution. *See Soo Line R.R. Co. v. Hawker Siddeley Canada, Inc.*, 950 F.2d 526, 528 (8th Cir. 1991) (citing *Rostad v. On-Deck, Inc.*, 372 N.W.2d 717, 719 (Minn. 1985) (en banc), *cert. denied*, 474 U.S. 1006 (1985)).

"[T]he constitutional touchstone [of personal jurisdiction] remains whether the defendant purposefully

established 'minimum contacts' in the forum State." *Burger King Corp. v. Rudzewicz,* 471 U.S. 462, 474 (1985) (quoting *Int'l Shoe Co. v. Washington,* 326 U.S. 310, 316 (1945)). "Th[e] 'purposeful availment' requirement ensures that a defendant will not be haled into a jurisdiction solely as a result of 'random,' 'fortuitous,' or 'attenuated' contacts." *Id.* at 475 (citations omitted). Thus, for the Court to acquire jurisdiction over a non-resident defendant, the defendant's contacts with Minnesota "must be sufficient to cause the defendant to 'reasonably anticipate being haled into court'" in Minnesota. *Epps v. Stewart Info. Servs. Corp.,* 327 F.3d 642, 648 (8th Cir. 2003) (quoting *World-Wide Volkswagen Corp. v. Woodson,* 444 U.S. 286, 297 (1980)).

The Eighth Circuit considers the following factors in determining whether personal jurisdiction is proper: (1) the nature and quality of the contacts with the forum state; (2) the quantity of contacts with the forum state; (3) the relation of the cause of action to the contacts; (4) the interest of the forum state in providing a forum for its residents; and (5) the convenience of the parties. *Dakota Indus., Inc. v. Dakota Sportswear, Inc.,* 946 F.2d 1384, 1390 (8th Cir. 1991). The first three factors are primary factors, the remaining two are secondary factors. *Id.* The Court looks to all of the contacts in the aggregate and examines the totality of the circumstances in making its determination. *Northrup King. Co. v. Compania Productora Semillas Algodoneras, S.A.,* 51 F.3d 1383, 1388 (8th Cir. 1995).

The third factor, the relation of the cause of action to the contacts, distinguishes whether the jurisdiction is specific or general. *See Digi-Tel Holdings, Inc.*, 89 F.3d at 522 n.4. "Specific jurisdiction refers to jurisdiction over causes of action arising from or related to a defendant's actions within the forum state while general jurisdiction refers to the power of a state to adjudicate any cause of action involving a particular defendant regardless of where the cause of action arose." *Id.*

Finally, "[e]ven if the minimum contacts threshold is established, personal jurisdiction may be defeated if its exercise would be unreasonable considering such factors as (a) the burden on the defendant; (b) the interest of the forum State; (c) the plaintiff's interest in obtaining relief; (d) the interstate judicial system's interest in obtaining the most efficient resolution of controversies; and (e) the shared interest of the several states in furthering fundamental substantive social policy." *St. Jude Medical, Inc. v. Lifecare Intern., Inc.*, 250 F.3d 587, 591 (8th Cir. 2001) (citing *Asahi Metal Indus. Co., Ltd. v. Superior Court*, 480 U.S. 102, 113-14 (1987)). Where personal jurisdiction over foreign defendants is sought, "[t]he unique burdens placed upon one who must defend oneself in a foreign legal system should have significant weight in assessing the reasonableness of stretching the long arm of personal jurisdiction over national borders." *Asahi*, 480 U.S. at 114.

C. No Personal Jurisdiction Exists Over Defendants

As an initial matter, the Court notes that Plaintiff does not contend in her brief and did not contend at oral argument that general personal jurisdiction exists over any of the named Defendants and the Court finds that no such jurisdiction exists. The named Defendants are all residents of foreign countries with limited contacts to this forum.[6] Therefore, the question for the Court is whether *specific* in personam jurisdiction exists over Defendants, whether by application of the *Calder* effects test or some other gauge of the constitutional due process touchstone that a defendant's contacts with Minnesota "must be sufficient to cause the defendant to 'reasonably anticipate being haled into court'" in

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[6] As noted above, Plaintiff's FAC does make some general allegations that Louis, Daniel, and Carole Coen have traveled to Minnesota. The Court finds these allegations insufficient to assert general jurisdiction over these Defendants. Nor is the Court persuaded by Plaintiff's FAC allegations that the Defendants somehow waived their personal jurisdiction objections by appearing by local counsel, "before a Court of the State of Minnesota in a matter related to and part of the present action." (FAC at 5-7.) It is not clear to the Court what "matter" Plaintiff is referring to, how it was related, or when it occurred. Thus, the Court finds Plaintiff has not met her burden to proffer evidence to support this allegation. In any case, the Court is not persuaded, given Defendants' timely and consistent objections to personal jurisdiction in this case, that Defendants waived any personal jurisdiction objection in making appearances in other matters.

Minnesota. *Epps*, 327 F.3d at 648 (citations omitted).[7] "Where specific personal jurisdiction over a non-resident is asserted, due process is satisfied if the defendant has purposefully directed its activities at forum residents, and the litigation results from injuries arising out of, or relating to, those activities." *Burlington Indus., Inc. v. Maples Indus., Inc.*, 97 F.3d 1100, 1103 (8th Cir. 1996). Specific jurisdiction may exist even when "the nonresident's contacts are minimal, but the cause of action arises out of or is related to those contacts." *KSTP-FM, LLC v. Specialized*

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[7] To the extent that Plaintiff is correct that the due process analysis applied here should be conducted in light of the Fifth Amendment rather than the Fourteenth Amendment, the Court finds that the relevant forum for analyzing Defendants' contacts in this case remains the State of Minnesota and not the nation as a whole. *See Dakota Industries, Inc. v. Dakota Sportswear, Inc.*, 946 F.2d 1384, 1389 (8th Cir. 1991) ("Although the Supreme Court has defined the 'minimum contacts' standard in the context of diversity jurisdiction, and it is clear that Congress can authorize nationwide service of process in federal question cases without offending due process, we nonetheless apply the minimum contacts analysis here. The fifth amendment is 'essentially a recognition of the principles of justice and fundamental fairness,' so it is appropriate that we examine the contacts with the forum *state*.") (citations omitted) (emphasis added); *see also, Zumbro v. Calif. Natural Prods.*, 861 F.Supp. 773, 777 n.8 (D. Minn. 1994) (noting that even where federal claims involving federally created rights are involved, "the standards under both amendments ... are the same" for purposes of analyzing personal jurisdiction); *see e.g., 3M Innovative Prop. Co. v. Infocus Corp.*, Civ. No. 04-009 JNE/JGL, 2005 WL 361494, *1-*4 (D.Minn. Feb. 9, 2005) (analyzing only defendants' contacts with Minnesota when applying the law of the Federal Circuit where plaintiff had brought patent infringement claims.)

Commc'ns, Inc., 602 N.W.2d 919, 923 (Minn. Ct. App. 1999); *see also Helicopteros Nacionales de Colombia, S.A.*, 466 U.S. at 414. Even a single, isolated transaction between a nonresident defendant and a resident plaintiff can be sufficient to justify exercising specific personal jurisdiction. *See e.g., McGee v. Int'l Life Ins. Co.*, 355 U.S. 220, 221-24 (1957).

Where intentional tortious wrongdoing is present, courts may also apply the so-called "effects test" set forth in *Calder v. Jones*, 465 U.S. 783, 788-90 (1984). The *Calder* "'effects' test provides that the exercise of personal jurisdiction over a non-resident does not violate due process where 1) the defendant committed an intentional tort; 2) the plaintiff felt the brunt of the harm in the forum state, such that the forum state was the focal point of the tortious activity; and 3) the defendant expressly aimed the tortious conduct at the forum such that the forum state was the focal point of the tortious activity." *Bible & Gospel Trust v. Wyman*, 354 F.Supp.2d 1025, 1030-31 (D. Minn. 2005).

Defendants attack Plaintiff's claim of specific personal jurisdiction under the *Calder* "effects" test on two fronts. First, Defendants argue that the focal point of Defendants' actions occurred outside of Minnesota because Louis' communications with Edward were merely a result of Edward's status as a shareholder seeking to cash in his shares. That is, Louis did not purposefully direct his actions toward Minnesota; he was responding to Edward's request for a buy-out. (Defs.' Reply at 7-8.) The Court agrees. While

Plaintiff contends that there is no evidence that Edward initiated the buy-back of his shares, Plaintiff has presented no evidence to suggest that Defendants initiated the buy-back of Edward's shares. Plaintiff has the burden to establish prima facie evidence of personal jurisdiction over Defendants. *Mountaire Feeds, Inc. v. Agro Impex, S.A.*, 677 F.2d 651, 653 (8th Cir. 1982). The Court has conducted a thorough review of the correspondence between Edward Coen and Defendants from 1989 through to March 31, 1999 and makes the following findings. The relevant correspondence does not begin until November 9, 1994, when Louis Coen states, "I understood in July that you [Edward] wanted to cash-in on your holding within the near future, so it is a sudden change that you want now to postpone it." (Doc. No. 122 at 4.) Louis is obviously responding to Edward's request to cash in his shares of a closely held corporation. Alone, Louis' or Compayne's response to Edward's proposal cannot be sufficient to establish an intent to commit a fraud with its focal point in Minnesota. Furthermore, the Court finds that the successive letters from Louis to Edward or Edward's sons were either Defendants' continuing response to Edward's initial cash-out proposal or responses to Edward's successive cash-out proposals. Again, these letters alone, do not constitute sufficient contacts with Minnesota whether under the traditional specific jurisdiction test or the *Calder* "effects" test, which still requires that a defendant *expressly aim* his tortious conduct at the forum such that the forum state was the *focal point* of the tortious activity. *Bible*, 354 F.Supp.2d at 1030-31.

Moreover, despite Plaintiff's assertions, whether or not the nonresident defendant is the aggressor in a transaction is important in assessing personal jurisdiction. *Telex Commc'ns, Inc. v. Sanomed Medizintechnik, GmbH,* Civ. No. 02-298 ADM/AJB, 2002 WL 31398725, *5 (D. Minn. Oct. 22, 2002) (citing *Dent-Air Inc. v. Beech Mountain Air Serv., Inc.,* 332 N.W.2d 904, 907-08 (Minn. 1983); *KSTP-FM, LLC v. Specialized Commc'ns, Inc.,* 602 N.W.2d 919, 924 (Minn. Ct. App. 1999) (holding that "where a nonresident defendant is an 'aggressor' in the transaction, it is more likely to have purposefully availed itself of the forum state's benefits and protection")). While Plaintiff may be correct that personal jurisdiction can still exist over a defendant who was not the initial or primary aggressor *where* the defendant demonstrates a subsequent eagerness or aggression towards the plaintiff, here there is no evidence that Defendants were ever eager or aggressive in their relationship with Edward. In fact, as Defendants point out, on a number of occasions, Defendants attempted to get Edward to delay the transaction or to reconsider his proposal because they were concerned his proposal was not in his own best interest. Louis also commented on one occasion that he "did not ask for or even expect" Edward to reduce his share in Compayne (Doc. No. 122 at 16) and described Edward's January 25, 1996 proposal as "very generous" (Doc. No. 123 at 49) and his May 23, 1996 proposal as "over generous" (Doc. No. 123 at 66). The Court finds that the record does not demonstrate that Defendants "intentionally aimed [their] tortious action at [Minnesota] and

could, therefore, have "'reasonably anticipate[d] being haled into court [here].'" *Hicklin,* 959 F.2d at 739 (quoting *Calder,* 465 U.S. at 790).

Second, Defendants contend that Plaintiff has not presented prima facie evidence to support her allegations that Louis or any other defendant engaged in an intentional tort against Edward. (*Id.* at 8.) To succeed on a claim for fraud/misrepresentation, a plaintiff must show:

> (1) there was a false representation by a party of a past or existing material fact susceptible of knowledge;
>
> (2) made with knowledge of the falsity of the representation or made as of the party's own knowledge without knowing whether it was true or false;
>
> (3) with the intention to induce another to act in reliance thereon;
>
> (4) that the representation caused the other party to act in reliance thereon; and
>
> (5) that the [plaintiff] suffered pecuniary damage as a result of the reliance.

Specialized Tours, Inc. v. Hagen, 392 N.W.2d 520, 532 (Minn. 1986). To assess whether Plaintiff has met her evidentiary burden under the *Calder* "effects" test, the Court must determine whether, on the record now before the Court, Plaintiff sufficiently sets forth prima facie evidence that Defendants committed an intentional tort. Here, Plaintiff contends the evidence

she has offered demonstrates (1) that at least Louis, Compayne, and Daniel intentionally misrepresented Lily's interest in Compayne and the resulting fraction of "asset value" accessible by Edward; and (2) the Defendants intentionally misrepresented the true "asset value" of Compayne in 1996. The Court finds that Plaintiff has not produced prima facie evidence of either of these allegations.

The Court agrees with Defendants that the record is devoid of evidence that would suggest Defendants represented to Edward that Lily was legally entitled to any more of the "asset value" of Compayne than that represented by her 1666 shares of Compayne. Plaintiff relies on Louis Coen's statements in letters dated January 18, 1996 and February 7, 1996 that (1) in "papers concerning" Victor Coen's will, Victor "wanted that 50% of his estate . . . be put aside in case of need by Lily"; (2) the cash-out discussions had "forgotten the terms of Victor's will" and concerned disposing of Lily's money; (3) the considerations of Lily's interest foreclosed Edward or Louis selling more than 1/2 of their shares; (4) the cash-out deal should "cash in on as many shares as possible without infringing on Lily's interests"; and (5) that Victor had expressed the wish that 50% of the shares or assets of the company be held for Lily. (Doc. No. 123 correspondence dated January 18, 1996 through February 7, 1996.) Plaintiff claims that these statements show Defendants' intentional intent to convince Edward that he could not "access" the full value of his shares. But the record belies this conclusory

allegation. There is no indication that Edward believed he was *legally* restricted by Lily's interest. For example, Plaintiff has attached as an exhibit to her FAC, an August 25, 1989 letter from Louis to Edward, in which Louis states:

> Last time we talked to each other on the phone I talked to you about Lily's stake in Dad's will which leaves us in control of practically the whole inheritance. He asked us, however, to put aside 2/3 of the capital and income for her in the eventual case that she recovers. . . . [H]is wishes are clear. We two are respons[i]ble to use this money, if it is needed, to assure Lily's needs if she recovers. The income, however, which she doesn't use should be divided among us two according to Dad's wishes. Unless, however, Lily recovers she will remain in the position of not needing nor even being able to use this income, let alone the principal.
>
> *Although Dad put no legal constraints on us,* our obligation is very clear that if she, miraculously, can benefit from this money or a part of it to have a little happiness, then it is our responsibility as long as she lives, to keep the principal intact.

(Doc. No. 13 at 3 (attached to Complaint as Exhibit I.D. at 3.) (emphasis added.)) Louis Coen's January 18, 1996 use of terminology is consistent with his sentiment, expressed in 1989, that, while no legal constraints existed, Edward and Louis had a moral obligation to uphold the wishes of their father that

Lily be taken care of for the remainder of her life. Further, prior to January 18, 2006, Edward's cash-out proposal included taking less than the full value of his shares, gifting some portion of his shares to Louis, or both. (*See* November 25, 1994, March 1995, and December 21, 1995 correspondence.) On February 1, 1996, after Louis' representations about Lily's "interest," Edward wrote to his sons that a reduced cash-out amount "may be a feasible and fair arrangement for safeguarding Lily's *moral claim* on 50% of the Company's assets to the extent that she may need it." (Doc. No. 13 at 101.) In that same letter, Edward also wrote: "*If* it is legally feasible, we would, out of the total amount received by us, segregate our full potential obligation to Lily in an investment account," suggesting that Edward recognized it was not an absolute legal requirement to segregate the funds for Lily. (Jan. 31, 1996 letter (emphasis added.)) On February 2, 1996, Edward expressly indicated that Lily had "16%" of the "legal allocation of shares" and a "moral allocation" of "50%" of the shares. (Doc. No. 13 at 106.) Moreover, Louis, in a letter dated February 7, 1996, stated to Edward, "I would think, however, that in three years, if [Lily's] situation has not changed, one third would be sufficient to cover any eventuality. What is your opinion?" (Doc. No. 123 at 49.) Regardless of the actual wishes of Victor Coen as set forth in his will, the Court finds that Plaintiff has

not presented prima facie evidence that Louis *intentionally* misrepresented Lily's interest in Compayne.[8]

Further, there is no evidence in the record to suggest that Louis or any of the other named defendants intentionally disguised or withheld the true

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[8] Plaintiff's counsel has filed with the Court a fifty-five page declaration with the Court that begins:

> Since the First Amended Complaint was filed in July, 2005, evidence and analysis has become available to Plaintiff that provides factual support for Claim One with regards to the fraction of the "asset value" of the company to which Ms. Lily Coen was "entitled." Plaintiff Dr. Deborah R. Coen believes that it would serve the interests of justice to allow her to amend the First Amended Complaint to include new allegations of fact regarding the fraction of the "asset value" of the company to which Ms. Lily Coen was "entitled."

(Busch Decl. (Doc. No. 128) at 1.) While most if not all of the material referenced therein is already in the record before the Court, in fairness to Plaintiff, the Court has reviewed the declaration in its entirety and, for purposes of considering Defendants' motion to dismiss, has deemed the allegations therein to be part of the FAC. In the declaration, Plaintiff's counsel states, "Plaintiff Dr. Deborah R. Coen believes that the language of the Victor Coen Will must be interpreted such that, at minimum, two-thirds of the assets contained in the Victor Coen Will Trust were to be retained by the Trust for the benefit of Ms. Lily Coen." The declaration takes fifty-five pages to state the underwhelming conclusion that the Victor Coen Will Trust contained no assets and thus, ultimately, Lily Coen only had a legal entitlement to "at maximum . . . 16.7% of the "asset value" of the company, not the 50% as represented by Defendant Mr. Louis Coen." (*Id.* at 24.) Whatever the true legal or moral claim, if any, by Lily, nothing in the declaration demonstrates prima facie evidence that Louis Coen *intentionally* misrepresented Lily's interest to Edward in an effort to defraud him.

asset value of Compayne in 1996. Louis disclosed that the Arnold valuation which was enclosed in Louis' letter dated December 27, 1994 was *not* prepared by an expert. (Doc. No. 122 at 17.) Edward responded in a handwritten document: "Who should evaluate the properties at such time as a division is requested? That question has no easy answer *perhaps we would be happy with any reasonably competent assessor.* Does Ariella have expertise in this area? Or in choosing the person to assess property?" The correspondence later reflects that Louis foresaw that the real estate holdings of Compayne would rise in value and argued, "no one has an advantage in rushing into a sale of property." (Doc. No. 123 at 42 (emphasis added.)) Fixing the price at £300,000 in 1996 was an idea supported by Edward because he apparently believed that the "risks and rewards implicit" in setting a fixed price "seem[ed] to balance" because Louis risked the value of the property would decrease and Edward risked the value would increase. (Feb. 22, 1995 letter.) When again on March 17, 1996, Louis suggested that other evaluations of Compayne's value could be sought, Edward, through his son Ethan, responded on May 23, 1996 that, "for the agreed-upon sale price" of £300,000 less other costs, "the company shall be buying back all of Ed's shares." (Doc. No. 123 at 65.) Finally, despite Plaintiff's urging that Lily's interest and the "asset value" of Compayne were the only "dispositive" factors in Edward's decision to sell his shares for less than their full value, the record is replete with Edward's uncontroverted statements that he considered liquidity, tax

consequences, Louis' contributions to the company, Edward's minority shareholder status, and his desire to not complicate his personal relationship with his brother in setting the price to be paid. In a letter dated February 12, 1996, Edward estimated that the "net amount" he would receive for cashing in all of his shares "would be about 225,000 pounds." (Doc. No. 124 at 8.) On March 31, 1999, Edward Coen received £285,843.61 for his 2146 shares. (Busch Decl. (Doc. No. 12) Ex. I.B. at App. Tab 4 § 2.)

As a result of the above findings, the Court determines that Plaintiff raises no genuine issue of fact material to the issue of personal jurisdiction. *Radaszewski,* 981 F.2d at 310. There is no evidence that Defendants *expressly aimed* any tortious conduct at the forum such that the forum state was the *focal point* of the tortious activity nor is there any evidence of *intentional* wrongdoing by Defendants. *Bible,* 354 F.Supp.2d at 1030-31. Therefore, the *Calder* "effects" test does not aid Plaintiff in demonstrating that this Court has personal jurisdiction over Defendants.

To the extent that Plaintiff argues that there is some other basis for specific jurisdiction over Defendants, the Court has also reviewed the totality of the record for such a basis on each of Plaintiffs' [sic] claims. Because the first three factors of the personal jurisdiction analysis applied in the Eighth Circuit – the nature and quality, the quantity, and the relation of the cause of action to the contacts – are "closely interrelated [the Court] consider[s] them together." *Northrup King Co.,* 51 F.3d at 1388. The Court finds

that the correspondence cited by Plaintiff, and perhaps some alleged but unspecified telephone conversations, are the only relevant contacts to a specific jurisdiction analysis – any other contacts simply are not related to her causes of action. Plaintiff argued at the motion hearing that it is significant that the final proposal for the conveyance of Edward's 4126 shares was drafted on the computer owned by Edward Coen on May 23, 1996. The Court disagrees. Plaintiff's FAC does not contain any contract claims and her allegations of fraud primarily concern representations made years prior to the creation of the document Plaintiff cites. Considering the aggregate of the contacts alleged and the totality of the circumstances, *see Northrup King,* 51 F.3d at 1388, the Court finds that there is no clear connection between Defendants' contacts and the causes of action alleged.

Furthermore, even if the Court were to find that minimum contacts had been established over some or all of the named Defendants, the remaining two factors considered in the five-part personal jurisdictional analysis – Minnesota's interest in providing a forum for this lawsuit and the convenience of the parties – make exercising personal jurisdiction over Defendants unreasonable. *See St. Jude Medical,* 250 F.3d at 591 (noting that "personal jurisdiction may be defeated if its exercise would be unreasonable considering such factors as . . . the burden on the defendant" and "the interest of the forum State"). The Court is cognizant that where personal jurisdiction over foreign defendants is sought, "[t]he unique

burdens placed upon one who must defend oneself in a foreign legal system should have significant weight in assessing the reasonableness of stretching the long arm of personal jurisdiction over national borders." *Asahi*, 480 U.S. at 114. Here, while Minnesota has an interest in seeing that fraud perpetrated against one of its citizens is adjudicated in Minnesota, at least some of Plaintiff's causes of action will likely require the application of English laws. Additionally, all of the named Defendants are residents of France or England and the history preceding the filing of this lawsuit, as set forth by Plaintiff in the record, demonstrates that Plaintiff has already engaged English legal channels and counsel concerning the same or related claims (i.e., fraud in the inducement of a contract, fraud in the representation of the value of the subject matter, breach of fiduciary duty of a director to shareholders, breach of fiduciary duty of a trustee to a trust, and fraudulent transfer of trust assets). (FAC (Doc. No. 12) Ex. I.B. Part I.)

Finally, while "[t]he burden of litigating in a foreign forum has become less significant as a result of advances in communication and transportation. . . . the law of personal jurisdiction is 'asymmetrical.'" *Fed. Deposit Ins. Corp. v. British-American Ins. Co., Ltd.*, 828 F.2d 1439, 1444 (9th Cir. 1987) (citations omitted). "The primary concern is for the defendant's burden." *Id.* In a case such as this," where Defendants have 'done little to reach out to the forum state,' other than respond to inquires by its shareholder or co-director or beneficiary or family member,

"the burden of defending [themselves] in a foreign forum militates against exercising jurisdiction." *Id.* While Plaintiff has compiled (and filed with her Complaint) many of the relevant documents in this case and some of her proposed key witnesses are located in Minnesota or the United States (Pl.'s Response at 30-31), many of the likely witnesses are located overseas. The Court finds that, overall, the convenience of the parties factor weighs in favor of Defendants.

The Court, therefore, recommends granting Defendants' motion to dismiss for lack of personal jurisdiction. Because the Court recommends dismissing all of Plaintiffs' claims without prejudice, the Court also recommends denying Plaintiff's pending motion for summary judgment on the issue of personal jurisdiction as moot.

Therefore, having reviewed the parties' submissions and arguments,

IT IS HEREBY RECOMMENDED that:

1. Defendants' Amended Motion to Dismiss (Doc. No. 77) be **GRANTED**;

2. Plaintiff's Motion for Summary Judgment or, in the Alternative, Motion for Evidentiary Hearing on the Issue of Personal Jurisdiction (Doc. No. 102) be **DENIED as moot**; and

3. All of Plaintiff's claims be **DISMISSED WITHOUT PREJUDICE**.

Date: July 10, 2006

s/ Susan Richard Nelson
SUSAN RICHARD NELSON
United States Magistrate Judge

Under D. Minn. L.R. 72.2(b) any party may object to this Report and Recommendation by filing with the Clerk of Court, and serving all parties by July 27, 2006 a writing which specifically identifies those portions of this Report to which objections are made and the basis of those objections. Failure to comply with this procedure may operate as a forfeiture of the objecting party's right to seek review in the Court of Appeals.

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No: 06-3812

Dr. Deborah R. Coen,

Appellant

v.

Louis Coen, et al.,

Appellees

No: 07-1210

Dr. Deborah R. Coen,

Appellant

v.

Louis Coen, et al.,

Appellees

Appeal from U.S. District Court for the
District of Minnesota – Minneapolis
(0:05-cv-00596-PJS)
(0:05-cv-00596-PJS)

ORDER

The petition for rehearing en banc is denied. The petition for rehearing by the panel is also denied.

January 22, 2008

Order Entered at the Direction
of the Court:
Clerk, U.S. Court of Appeals,
Eighth Circuit.

/s/ Michael E. Gans

UNITED STATES COURT OF APPEALS
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(0:05-cv-00596-PJS)
(0:05-cv-00596-PJS)

ORDER

The court's order of January 22, 2008, denying the petition for rehearing en banc is hereby vacated as the order was entered prematurely.

January 25, 2008

Order Entered at the Direction
of the Court:
Clerk, U.S. Court of Appeals,
Eighth Circuit.

/s/ Michael E. Gans

UNITED STATES COURT OF APPEALS
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No: 06-3812

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(0:05-cv-00596-PJS)
(0:05-cv-00596-PJS)

ORDER

The petition for rehearing en banc is denied. The petition for rehearing by the panel is also denied.

February 20, 2008

Order Entered at the Direction
of the Court:
Clerk, U.S. Court of Appeals,
Eighth Circuit.

/s/ Michael E. Gans